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OF
ONTARIO,
WITH REMARKS AND CASES,

BY
ALEXANDER LEITH,
OF TORONTO, BARRISTER-AT-LAW.

TORONTO:
HENRY ROWSELL,
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PREFACE.

The Author, as Referee of Titles under the Act for Quieting Titles, and as Reader on the Law of Real Property to the Law Society, had frequent occasion to consider and annotate the various Statutes relating to that branch of the Law, and they formed the subject of many Lectures delivered by him at Osgoode Hall. He conceived the idea of publishing the result of his labors in a shape, which, he hoped, with but little further labor to himself, might perhaps be of service to the Profession. He has been compelled however to abandon the original design of treating of all the important Real Property Statutes at one time, from the difficulty in keeping pace with the Legislature, and the necessity for constant alterations of the text arising from ever recurring change in the Laws.

It has been remarked, with expression of regret, by Mr. Chancellor Kent, that frequent change of the laws is prevalent in the United States, and is, he says, characteristic of the restless disposition of his fellow citizens. The reverse is the case in England. Mr. Wood in the preface to his valuable treatise on the Registry Laws has said that whilst in England "the Statutes of Anne, and that of 8 George II. relating to Yorkshire remain yet in force, and have not even been added to or amended in any important particular, the statute book of Upper Canada has been prolific in amending, explaining, consolidating, and repealing enactments relating to that branch of the Law." Legislation here since as well as before those remarks fully justify

them. Probably the mutability of our Laws is to be ascribed rather to their being often framed with no sufficient appreciation of the existing law, or its mischief, or of the remedy requisite, than to that cause to which the learned Chancellor alludes.

Complaints on the character of legislation with us both from the Bench and the Profession have been frequent and of long continuance. The Author may therefore be excused, if occasionally, in treating of an obscure clause in a Statute which has received no light from judicial decisions, he has hazarded no opinion, or done no more than call attention to difficulties, which might possibly have escaped observation.

The Chapter on Descent and part of the Chapter on Dower are taken, with many alterations, from the work of the Author on the Commentaries of Blackstone adapted to the Law of Upper Canada; a course justified by the alterations made, and the probability that that work will shortly be out of print.

The Author has to express his thanks to his friend Mr. Joseph for the preparation of the Index, and his assistance in carrying the Work through the Press.

TORONTO, *April 1*, 1869.

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- PP. 4, 5, 6.—On the covenant against assignment without leave, that assignees in law are not bound though assigns are named, and that their assigns are bound, if assigns are named; see *Winter v. Dumerque*, 12 J. N. S. 726, Ex. Chamber.
- P. 58.—As to an instrument operating as a lease or as a mere agreement for a lease, see *Davidson Convey.* vol. 5, p. 6, and cases there cited.
- PP. 9, 72.—That a proviso for re-entry in a lease in case the lessee should be convicted of an offence against the game laws, does not run with the reversion, see *Stevens v. Copp*, L. R. 4 Ex. 20, but see per Kelly, C. B. As to covenants with a vendor of portions of lands against building thereon running with the land retained in favor of the grantees thereof, *Western v. Macdermot*, L. R. 1 Eq. 449. See further as to covenants not running with the land at Law, and yet being binding in Equity if notice had of the covenant; *Wilson v. Hart*, L. R. 1 Cha. App. 463.
- P. 191.—It is conceived that in case of death of a mortgagee, he would not, at Law at least, be so far regarded as a trustee as to prevent the application of the Statute of Victoria, and descent by primogeniture, and that in this respect Equity would follow the Law.
- P. 325.—The present practice of the Court of Chancery, under the Act for Quieting Titles, is to require that the existence of an execution in the Sheriff's hands should be negatived for a period of thirty days before the petition, from which it may be inferred that a delay to redeliver for that period would be an abandonment.
- P. 377.—That a second mortgagee, though his mortgage be *on trust* to sell, may purchase irredeemably on a sale by a prior mortgagee, see *Kirkwood v. Thompson* 13 W. R. 495, 1052, 11 Jur. N. S. 385, S. C.
- PP. 401, 402, 403.—That possession is constructive notice; *Gray v. Couch*, 15 Grant, 419. That however constructive notice by possession will not prevail against a registered instrument under the Registry Act of 31 Vic., see *Sherboneau v. Jeffs*, 15 Grant, 574.
- P. 278.—A married woman, who was residuary legatee to her separate use under Con. Stat. ch. 73, held bound by her authority to the executors, with her husband's assent, to take land in payment of a debt due the testator; and *semble* even without the husband's assent; *McCargar v. McKinnon*, 15 Grant, 361.
- PP. 223, 224.—That a wife having joined with her husband in a mortgage, is not entitled in case of deficiency of assets on his death, to have the estate exonerated as against simple contract creditors to let in dower; *White v. Bastedo*, 15 Grant, 549, overruling *Sheppard v. Sheppard*, 14 Grant, 174; see also *Thorpe v. Richards*, 15 Grant, 408.
- P. 324.—That a purchaser under execution will not be affected by mere want of non-compliance with the Statute as to advertising the sale by the Sheriff &c; *Connor v. Douglas*, in Appeal, 15 Grant, 456, and cases there referred to.

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An Act to amend the law of Property and Trusts in Upper Canada.

[Assented to 18th September, 1865.]

This Act is taken from the Imperial Acts of 22 and 23 Vic. ch. 35, and 23 and 24 Vic. ch. 38.

SECTIONS 1 & 2.

1. Where any license to do any act, which, without such li- Restriction
cense, would create a forfeiture, or give a right to re-enter, under on effect of
a condition or power reserved in any lease heretofore granted, license con-
or to be hereafter granted, shall at any time after the passing of tained in lease,
this Act, be given to any lessee or his assigns, every such license &c., Imp. Act
shall, unless otherwise expressed, extend only to the permission 22, 23 Vic.,
actually given, or to any specific breach of any proviso or cove- c. 35, s. 1.
nant made or to be made, or to the actual assignment, under-
lease, or other matter thereby specifically authorized to be done,
but not so as to prevent any proceeding for any subsequent breach
(unless otherwise specified in such license); and all rights under
covenants and powers of forfeiture and re-entry in the lease con-
tained, shall remain in full force and virtue, and shall be avail-
able as against any subsequent breach of covenant or condition,
assignment, under-lease, or other matter not specifically authorized
or made punishable by such license, in the same manner as if
no such license had been given, and the condition or right of
re-entry shall be and remain in all respects as if such license had
not been given, except in respect of the particular matter author-
ized to be done.

2. Where in any lease heretofore granted or to be hereafter Restricted
granted, there is or shall be a power or condition of re-entry on operation of
assigning or under-letting or doing any other specified act with- part. licenses.
out license, and a license at any time after the passing of this Imp. act 22,
Act shall be given to one of several lessees or co-owners to assign 23 V., c. 35,
or underlet his share or interest, or to do any other act prohib- s. 2.
ited to be done without license, or shall be given to any lessee
or owner, or any one of several lessees or owners, to assign or

underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such license shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees or owner or owners of the other shares or interests in the property, or by the lessee or owner of the rest of the property, (*as the case may be*), over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such license.

Dumpor's case:—destruction of entire condition on license of any breach.

It was to remedy the law as laid down in Dumpor's case (a) and the decisions thereon that these enactments were made. The result of that case was to establish, that when in a lease a right of re-entry was reserved to the lessor on the lessee assigning without license, and the lessor granted a license to assign in any one particular case, such license satisfied or dispensed with the condition entirely, so that afterwards an assignment might be made without license, and no forfeiture be incurred. And this would be so, even though the license were to assign to a particular individual with an express stipulation therein that it should extend no further, and should not warrant future or other assignments. It was supposed also that, if there were other covenants besides that not to assign without leave, and the condition gave power to re-enter on breach of any one of them, the license not to observe any one covenant dispensed with the condition not only on breach of that one, but as to all. So also, if the reversioner licensed one of several lessees to assign his interest in the whole, this dispensed with the condition as to all: and as the condition cannot be divided or apportioned by act of the parties, an alienation of part of the land with the assent of the lessor determined the condition as to that part, and therefore as to all the lands. Further, where the lessor severed his reversion by conveyance, the assignees of part could not enter for breach of the condition, for by sever-

(a) 4 Coke 119 ; 1 Smith Lg. Ca.

ance of part of the reversion, the condition was destroyed in all (a). The principle throughout the above was that the condition as originally created was entire and indivisible, and if part of it were destroyed, the whole perished.

The Real Property Commissioners, in their third report on the subject, say—"It has not, so far as we are aware, been decided that this doctrine applies to any other covenant or condition than that against alienation (b); but it would seem to be equally applicable on principle to covenants and conditions restrictive of carrying on particular trades, or converting land from pasture to arable, and to all covenants and conditions by which the license or consent of the lessor is made requisite for doing any particular act."

The doctrine is not confined to conditions against alienation.

No form of words contained in the license, as that it should only extend to that particular person or occasion, and should not operate as a total waiver of the condition, but that the same should be in force on future breach, would prevent the condition from being destroyed (c). As terms of years may be made voidable by a defeasance made at any time after their creation, the course adopted when it was desired to give the license and yet have the benefit of the condition on future breaches, was to execute a collateral deed of defeasance reviving the condition and making it applicable to future breaches. This however requires the consent of all those who were parties to the creation of the estate, or in whom the respective estates and interests of such parties are vested at the time of execution of the defeasance (d). It may be necessary still to adopt this course on license to omit to do an act, the non-performance of which would create a forfeiture, because the act does not appear to extend to such a case, as will now be explained.

Course adopted to revive the condition on license.

(a) Sugd. Stats. 2 ed. 310. See further, the remarks post under sec. 4.

(b) See, however, this subject adverted to by Lord Eldon in *Macher v. The Foundling Hospital*, 1 V. & B. 191.

(c) *Mason v. Corder*, 7 Taunt 9, per Gibbs, C. J.

(d) *Watkins Conv.* 9 ed. 41, note; *Shepp. Touch*, 396; 3 Byth. & Jar. *Conv.* by Sweet, 683.

The act only applies to license to do an act, not to leave an act undone.

It is apprehended that the principle in *Dumpor's* case would apply, as well to a license not to do an act, the doing of which is enjoined under penalty of forfeiture, as to the doing an act which if done without license is a forfeiture. The act extends however only to the latter (a), and there is equal necessity that it should apply to the former, if within *Dumpor's* case. There are frequently covenants under which the lessee agrees to do various acts, the non-performance of which gives right of re-entry, and it may be unsafe to dispense with the performance of any such covenant.

Does the act extend to a license given to executors?

The Act does not expressly extend to executors and administrators, though generally they are named, as well as assigns, when intended to be included. The Act speaks only of a license given to a "lessee and his assigns." It would seem, however, that for the purposes and on the construction of this Act at least, the word "assigns" will include personal representatives as assignees in law (b).

If the Act does not extend to personal representatives, then, where they are named in, and so bound by the condition, a license to them to assign would operate as at common law, as above mentioned, to destroy the whole right of re-entry.

Assignment by act of law works no forfeiture.

As a general rule, an assignment by operation of law works no forfeiture, though without license, as to personal representatives (c), and to assigns in bankruptcy (d); but if the lessee became bankrupt voluntarily on his own petition, it might be different (e): nor does an assignment by a sheriff under execution (f); but where a tenant gave

(a) As to the distinction between positive and negative covenants, see *Doe v. Marchetti*, 1 B. & Ad. 715; *Doe v. Stevens*, 3 B. & Ad. 299.

(b) Post p. 6, note a.

(c) 2 Wms. Exrs. 6ed. 879.

(d) *Doe v. Bevan*, 3 M. & S. 353; *Wadham v. Marlowe*, 2 Chitty, 600.

(e) *Hill v. Cowdery*, 1 H. & N. 360; *Billiter v. Young*, 6 E. & B. 1; *Holland v. Cole*, 1 H. & C. 67; *Cole Eject.* 436, 437; *Woodfall Ld. & Ten.* 554, 9th ed.; and *Davidson Conv.* 2 ed. vol. 3, pp. 88, 89, 90.

(f) *Doe Mitchinson v. Carter*, 8 T. R. 300; see also *Croft v. Lumley*, 6 H. L. Ca. 672.

a warrant of attorney to a creditor for the express purpose of enabling such creditor to take the lease in execution, this was held to be in fraud of, and a breach of the covenant not to assign (*a*). Acquisition of the term by a man by virtue of his marital right on marriage with a female lessee, is no forfeiture (*b*). From all this, therefore, it appears that assignment by act of law will not work a forfeiture; such, however, may be so by use of proper language in the lease.

The question now has to be considered, how far assignees in law are bound by the restraint against alienation, when once the estate has by act of law vested in them; and also how far their assignees, or assignees in deed, are so bound.

How far assignees in law and their assigns bound.

Assignees in deed are or are not bound, according as they are or are not named in the covenant (*c*). Assignees in bankruptcy are not bound, and may alien without leave, though the covenant extend to assigns (*d*); and if the covenant does so extend, the purchaser from the assignee in bankruptcy, it seems, would be bound (*e*). The same observations apply where the term is sold under execution. As regards executors or administrators, if the covenant extend merely to restrain the lessee, they can assign without leave (*f*), but if named, they cannot (*g*). If the covenant extends only to restrain the "lessee and his assigns," it would seem the personal representatives are within the

(*a*) *Doe v. Carter*, *supra*.

(*b*) *Anon*, *Moore*, 21.

(*c*) *Doe v. Smith*, 5 Taunt, 795; *Paul v. Nurse*, 8 B. & C. 489, per *Bailey J.*; *Bally v. Wells*, 3 Wils. 33; *Williams v. Earle*, L. R. 3 Q. B. 739.

(*d*) *Doe v. Bevan* *supra*, but see the remarks in 1 *Smith Lg. Ca.* 6 ed. p. 44.

(*e*) This may be inferred from *Doe v. Smith*, 5 Taunt, 795; *Paul v. Nurse*, 8 B. & C. 486, per *Bailey, J.*; *Williams v. Erle*, *supra*; see also *Lloyd v. Crispe*, 5 Taunt, 249; *Weatherall v. Geering*, 12 Ves. J. 511; but see the third report of Real Property Commissioners, given in 1 *Davidson Conv.* 3 ed. 132, 133; and see vol. 5, ed. 2, p. 178, note.

(*f*) *Lloyd v. Crispe*, 5 Taunt. 249; *Anon*, *Moore*, 21; *Seers v. Hind*, 1 Ves. Jun. 295; but see 2 *Wms. Exrs.* 6 ed. 880.

(*g*) *Lloyd v. Crispe*, *supra*; *Roe d. Gregson v. Harrison*, 2 T. R. 425.

word assigns, and cannot alienate without leave (a), but the point is not very clearly decided.

It has been said that it does not appear to have been expressly decided whether assigns of assignees in law are bound (b).

The condition against assignment without leave should always extend to executors, admrs, and assigns.

It will be seen from what has been said that the word "assigns" and the words "executors and administrators" should never be omitted in the covenant or condition against alienation; it has been usual to omit it both before and since this Act, and in this respect the act respecting short forms of leases is faulty, as it extends only to the lessee (c). The omission of the word assigns has arisen from the supposition that under the law in *Dumpor's case*, assigns never could be bound after license to alienate was once given to the lessee and others, thus destroying entirely, as above explained, the whole condition. No doubt this was so, but what was lost sight of was, that alienation might take place without license, by act of law, and that in such cases the parties so taking would be bound in their turn, if the condition, by use of proper words, extended to them, as has been shown before. Moreover the lessee might have *underlet* without license, and the reversioner have *waived* the condition, and whatever might have been the case on an *assignment* (d), it would seem that the waiver of an underletting did not come within the doctrine in *Dumpor's case*, but the condition remained applicable to the assignee if named therein (e).

What is a breach of covenant not to assign or sublet.

As to what will amount to breach of covenant or condition not to assign or sublet, the following cases collected in *Smith's Leading Cases*, will be of service.

When the condition was "not to assign, transfer, set-over, or otherwise do and put away the indenture of de-

(a) *Thornhill v. Adams*, Cro. Eliz. 757, per Walmsley, J.; *Shepp. Touch*, 145; 1 *Dyer* 6; *Sir W. More's Case*, Cro. Eliz. 26; *Moore*, 44, pl. 136; see also 1 *Smith*, Lg. Ca. p. 44, 6 ed.; *Wms. Exrs.* 6 ed. 879, vol. 2.

(b) *Davidson Conv.* vol. 5, 2nd ed. p. 178, note. See ante p. 5, note c, and 3rd report of Real Property Commissioners.

(c) See the observations in treating of that Act.

(d) See p. 8, note a.

(e) See p. 8.

mise, or the premises thereby demised, or any part thereof," an under-lease was held no breach of it (a) : so, of an equitable mortgage (b) : but a condition not to "sub-let, or assign over the demised premises or any part thereof, comprehends under-leases (c) : and a covenant not to "let, sell, or demise for all or any part of the term," assignments. (d). Letting lodgings was held by Lord Ellenborough not to be a breach of condition not to underlet any part of the premises without the license of the lessor (e).

The cases are said to be conflicting on the question whether a bequest of the term to another than the executor is a breach of the condition (f).

SECTION 3.

3. Where any actual waiver of the benefit of any covenant or condition in any lease, on the part of any lessor, or his heirs, executors, administrators, or assigns, shall be proved to have taken place after the passing of this Act, in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.

Actual waiver not to extend further than to the particular instance mentioned, and not to be deemed a general waiver. Imp. Act 23, 24 V., c. 38. s. 6.

This section pre-supposes that theretofore, if the reversioner waived a breach of covenant or condition, giving a right of re-entry, it was not merely a waiver *pro hac vice*, but that the whole was gone, and that if there were a right of forfeiture on breach of any one of several matters or covenants, a waiver of a breach of any one would "extend to any instance or any breach of covenant or condition other than that to which such waiver specially relates,"

Waiver, effect of, restrained to the particular matter waived.

(a) *Crusoe v. Bagby*, 3 Wils. 234.

(b) *Exp. Drake*. 1 M. D. & De G. 539; *Doe v. Hogg*, 4 D. & R. 226.

(c) *Roe v. Harrison*, 2 T. R. 425; *Roe v. Sales*, 1 M. & S. 297; *Doe d. Holland v. Worsley* 1 Camp. 20.

(d) *Greenaway v. Adams*, 12 Ves. 395.

(e) *Doe v. Laming*, 4 Camp. 73.

(f) See *Cole Eject* 437; see also 1 Smith Lg. Ca. 6 ed. p. 43.

This section framed in misconception of the law.

so as to preclude a forfeiture on breach of any other matter or condition: it presupposes also that a waiver of a breach of a covenant or condition was "a general waiver of the benefit" of it, so as to preclude the reversioner from right to forfeit on any future breach. If this were so, then a waiver and a license would not differ in their consequences; there is, however, much authority to shew that this is not so, and that the Act was framed in misconception of the law. All the text writers agree as to the law not being as the Act assumes, except as regards an assignment without leave, as to which they vary (a).

The act applies only to actual, not to implied waivers.

The question whether the law is as the Act assumes it to be, is one of considerable practical importance in regard to those cases to which the Act does not relate; and as it only applies to cases of *actual* or *express* waiver, it would seem that those of implied or constructive waiver (by far the most common), arising out of conduct or acts inconsistent with the right to insist on a prior forfeiture, such as receipt, with notice of the right to forfeit, of after accrued due rent, are not provided for by the Act. Where the reversioner sues for or receives such rent, *quod* rent, with knowledge of the breach committed, this is not an actual or express waiver, as would be the case if he in writing or by parol abandoned his right to forfeit; but it is construed as a waiver of such right by implication, arising out of the fact that he has treated the lease as subsisting, and is estopped by this matter *in pais* from asserting the contrary, and treating the tenant as a trespasser. The language of the Imp. Act 7 Geo. IV. ch. 29, sec. 4, is much as this section, and it seems clear that in that section, the words "actual waiver" exclude implied waiver; for sec. 1 gives instances of actual

(a) Jarman Conv. by Sweet, vol. 4, p. 377, and see p. 379, where when a lessor is willing to allow an assignment *pro hac vice* only provided it do not extend to destroy the condition restraining it as to the future, it is recommended that he agree to *waive* the forfeiture. Smith Real Prop. 3 ed. 72; Cole Eject. 409; Burton 853; Platt Covenants, 428; Dumpor's case, 1 Smith Lg. Ca. 6th ed. 42; 1 Wms. Saund. 288; Davidson Conv. vol. 5, 2 ed. 179; Doe v. Pritchard 5 B. & Ad., 781, per Patterson J.; Dowell v. Dew, 1 Y. & C. C. C. 366; Lloyd v. Crispe 5 Taunt, 257.

waiver in writing ; sec. 3 alludes to actual waiver by parol and also to constructive waiver. The section of the Imp. Act from which ours is copied was taken from this Act of Geo. IV.

If the act does not apply to implied waivers, and if the law is as the act assumes it to be, then a landlord must insist on the forfeiture, under the penalty, if he receives subsequent rent, of loss of right of re-entry on any subsequent breach of the same or any other contract giving right of forfeiture.

SECTION 4.

4. Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reservation (a) in respect of the apportioned rent or other reservation allotted or belonging to him.

Apportionment of condition of re-entry in certain cases.
Imp. Act 22, 23 V., c. 35, s. 3.

This section, is taken from the Imp. Act 22 & 23 Vic. c. 35, and the principle on which it proceeds is recognized in the Imp. Acts 12 & 13 Vic. c. 49, and 17 & 18 Vic. c. 32, and the Lands Clauses Act, sec. 119.

What is meant by severance of the reversion, is the case of conveyance by the reversioner of part of the lands ; as on a lease of two acres and a conveyance of one. The case of a conveyance of the whole lands for part of the reversion, as where a reversioner in fee should convey all the lands to one for life, is not within this act. Such a case is provided for by 32 H. VIII. c. 34, under which grantees of reversions are entitled to the same benefit of a condition as their grantors would have had, provided it relate to payment of rent, restriction from waste, or other object tending to the benefit of the reversionary estate. Con. Stat. U. C. c. 90, authorizing conveyance of rights of entry, does not apply to

does not apply to conveyance of the whole land for part of the reversion.

(a) Thus in the Statute, should be reversion.

rights of entry for condition broken, as is explained in treating of that Act.

Com. Law rules, indivisibility of conditions.

It was before explained (a) that at Common Law a condition is indivisible, and the party claiming the benefit of a condition giving right of entry, must not have precluded himself from right to re-enter on the *whole* property. If he have released part of the property from the condition, or conveyed the reversion of part to a stranger, the condition is destroyed *in toto*; otherwise a lessee might be subjected to several rights of entry by several owners on several parts of the property. The consequence of the Common Law rule was very inconvenient, and this section relieves, so far at least as regards remedy for "rent or other reservation."

Course adopted on destruction of a condition was to revive it by executing a deed of defeasance.

As the act only extends to preserve remedies as to rent, a deed of defeasance still requisite to preserve other remedies.

The rent must be apportioned.

Mode of apportionment.

The mode adopted to give right of re-entry on non-payment of rent or non-performance of covenants, when the condition of re-entry was destroyed by severance of the reversion, or by license given to commit the breach, was by execution, at the time, of a collateral deed of defeasance reviving the condition, as before explained (b). As the Act (on ample grounds) preserves the benefit only of conditions *quoad* "rent or other reservation," and would not extend to conditions of re-entry for breaches of covenants which did not so relate, as for instance to repair, it will still be requisite, if the conditions are to continue in regard to such breaches, that a deed of defeasance should be resorted to.

The rent or other reservation must be legally apportioned. The apportionment may be by act of law or act of the parties. Apportionment by act of law takes place where the amount of rent has been settled by a jury in a suit between the parties concerned in the rent; that by act of the parties, is on consent of all interested in the term and the reversion (c).

(a) Ante. pp. 2 & 3. See also Shelford Statutes 7 ed. p. 685.

(b) Ante p. 3 remarks on ss. 1 & 2.

(c) Bliss v. Collins, 5 B & Ald. 876. See also as to apportionment, notes to Clun's Case, Tudor's Lg. Cases, Rl. Prop. 2 ed. 240.

SECTIONS 5 & 6.

5. The Court of Chancery shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the Court, in conformity with the covenant to insure, upon such terms as to the Court may seem fit.

Relief against forfeiture for breach of covenant to insure in certain cases.

Imp. Act 22, 23 V., c. 35, s. 4.

6. The Court, where relief shall be granted, shall direct a record of such relief having been granted to be made by endorsement on the lease or otherwise.

When relief is granted, the same to be recorded.

Imp. Act 22, 23 V., c. 35, s. 5.

The Imperial Act 22 & 23 Vic. c. 35, from which these sections are taken, has a clause restraining power to relieve the same person more than once, or where a former waiver has taken place out of Court of a prior breach of the covenant or condition as to which relief is sought.

The Court can relieve for a breach, committed after the passing of the act of a covenant in a lease granted before the Act (a).

Retrospective

In England, the power to relieve is not confined to the Court of Chancery, but may be exercised by the Common Law Courts (b).

SECTION 7.

7. The person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire, shall, on loss or damage by fire happening, have the same advantage from any then subsisting insurance relative to the building or other property covenanted to be insured, effected by the lessee or mortgagor in respect of his interest under the lease or in the property, or by any person claiming under him, but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant.

Lessor to have benefit of an informal insurance.

Imp. Act 22, & 23 V., c. 35, s. 7.

(a) Page v Bennett, 2 Giff. 117 ; 6 Jur. N. S. 419.

(b) 23 & 24 Vic. c. 126, s. 2.

Benefit of this section diminished by application of 14 Geo. III. c. 78, s. 83.

The practical benefit of this section is diminished by decision in *Stinson v. Pennock*, hereafter referred to, (a) that the Imperial Act, 14 Geo. 3, c. 78, s. 83, is in force in Ontario.

SECTION 8.

Protection of purchaser against forfeiture under covenant for insurance against fire in certain cases. Imp. Act 22 & 23 V. c. 35, s. 8.

8. Where on a *bonâ fide* purchase, after the passing of this Act, of a leasehold interest under a lease containing a covenant on the part of the lessee to insure against loss or damage by fire, the purchaser is furnished with the written receipt of the person entitled to receive the rent, or his agent, for the last payment of the rent accrued due before the completion of the purchase, and there is subsisting at the time of the completion of the purchase, an insurance in conformity with the covenant, the purchaser or any person claiming under him, shall not be subject to any liability by way of forfeiture or damage or otherwise, in respect of any breach of the covenant committed at any time before the completion of the purchase, of which the purchaser had not notice before the completion of the purchase; but this provision is not to take away any remedy which the lessor or his legal representatives may have against the lessee or his legal representatives for breach of covenant.

Does not apply to mortgages.

This section would not seem to apply to mortgages. The purchaser should preserve evidence that he was, on the purchase, furnished with the receipt.

SECTION 9.

To what leases the preceding provisions shall apply. Imp. Act 22 & 23 V. c. 35, s. 9.

9. The preceding provisions shall be applicable to leases for a term of years absolute, or determinable on a life or lives, or otherwise, and also to a lease for the life of the lessee or the life or lives of any other person or persons.

SECTION 10.

Release of part of land charged not to be an extinguishment of the charge on the rest, &c. Imp. Act 22 & 23 V. c. 35, s. 10.

10. The release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released, without prejudice, nevertheless, to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the releases.

(a) 14 Grant, 604. See chapter on Mortgages, post.

This section is taken from the Imp. Act 22 & 23 Vic. c. 35.

If the owner of the rent released part of the land from the charge, the whole rent was discharged, for the charge is entire, and issues out of and is charged on every part of the land, and is also against common right (a). So also, if the owner of the rent purchased, or took by devise (b), part of the lands charged, the whole charge was released by operation of law; and it would seem, as hereafter explained, that the act will not prevent a release when it takes place by operation of law. But if part of the lands be acquired by descent, or by title paramount (c), no release would take place under the old law; and the owner of the rent could always release part of it to an owner of the land.

A release, purchase, or taking by devise of part of the land charged, released the whole rent; but no release took place when the land was not acquired by act of the party, or on release of part of the rent.

It may well be contended that the Act does not apply to prevent a release where it takes place by operation of law, as on purchase or taking by devise of part of the lands. The expression, that the release "shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released," implies the existence of some one owning the part released, other than the releasor, against whom the releasor was to be barred of right to recover; such expression would not be applicable where the lands released became the property of the owner of the charge, who cannot be supposed to have required legislation to bar his right to recover out of his own lands. Moreover, the act contemplates a concurrence in, or confirmation of the release, and it may be said this would not apply when the release is the mere result, by operation of law, of acquiring the lands, and is not a release in deed.

Does the act apply to a release by operation of law, as on purchase of part of the land?

Before the Act, if there were several owners of the land, and the owner of the rent charge enforced payment of all from one of such owners, the latter had his remedy in equity for contribution against the other owners; it would

Right of contribution of any one of several owners paying the whole charge.

(a) Co. Litt. 148; see also generally, notes to Cluns case, Tud. Lg. Ca., 2ed, 240; 2 Jar. & By. Conv. by Sweet, 60.

(b) *Dennett v. Pass*, 1 B. N. C. 388. (c) Co. Litt. 148 b.

seem he had no remedy at law (a). The right for contribution of the owners of so much of the lands as may be unreleased is preserved by the Act, on any of the lands being exempted by a release from payment.

Difficulty of enforcing contribution.

There must necessarily be sometimes great difficulty in the attempt of one of several owners of the land, who has paid all the rent, to enforce his personal remedy against the other owners. Such a remedy arises by reason of privity of estate, and in case the land charged with the rent has passed into the hands of various persons, through several chains of title, it may be almost impossible to prove that ownership which alone creates the liability. It is presumed also, as the rent would have to be apportioned as to the several owners according to value, and as in equity the various portions of the land are as sureties for each other, that all the co-owners must be parties to the suit. These difficulties are not the result of the Act, for they existed before; they arise necessarily where there is one rent-charge paid by one of several owners of the land charged.

Sometimes on sale of lands subject to an entire rent-charge to different persons, the rent is apportioned on the several parcels, and the purchasers take and give cross powers of entry and distress for the apportioned rent (b).

SECTION 11.

Mode of executing powers

11. A deed hereafter executed in the presence of, and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing, not testamentary, notwithstanding it shall have been especially required

Proviso: not to defeat certain directions.

Imp. Act 22 & 23 V., c. 35, s. 12.

that a deed or instrument in writing, made in exercise of such power, should be executed or attested with some additional or other form of execution or attestation or solemnity; Provided always, that this provision shall not operate to defeat any direction in the instrument creating the power, that the consent of

(a) *Hunter v. Hunt*, 1 C. B. 300.

(b) See 1 Davidson Conv. 2 ed. p. 468.

any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument; and nothing herein contained shall prevent the donor (a) of a power from executing it conformably to the power, by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend.

The Imperial Acts on this subject are those of 22 & 23 Vic. ch. 35, sec. 12, and 54 Geo. III. ch. 168.

As powers require to be strictly executed, especially when not coupled with an interest, it had been held that in the common case of a power given to be exercised under *hand and seal* and attested by witnesses, that the exercise of the power was invalid if the witnesses did not attest the fact of signing as well as of sealing, and consequently that a deed executed with the attestation in the form usually followed (in England at least), viz., "sealed and delivered in presence of," would not suffice (b), nor would an attestation clause thus, "witness A. B."

Defective execution of powers.

It would seem that the Act will not extend to *consent* to execution of a power, which is frequently enjoined, and required also to be given under certain formalities.

Act does not extend to *consents* to execution of a power.

The defective execution of a power may often be remedied and aided in equity (c) in favor of a purchaser from a person exercising the power, or of a creditor, wife or child, or charitable purpose.

Defective execution aided by equity.

The word "donor" in this section is a misprint for "donee."

Word 'donor' a misprint.

SECTION 12.

12. Where, under a power of sale, a *bond fide* sale shall be made of an estate, with the timber thereon, or any other articles

Sale under power not to be avoided by

(a) Donee?

(b) Wright v. Wakeford, 4 Taunt. 213; but see Vincent v. Bishop of Sodor and Man, 5 Ex. 683, 693; Burdett v. Spilsbury, 10 C. & F. 340; see further, Sugden on Powers.

(c) See Sugden on Powers, and notes to Tollet v. Tollet, 1 W. & T. Lg. Ca. Eq.

reason of mis-
taken pay-
ment to ten-
ant for life.
Imp. Act 22
& 23 V., c.
35, s. 13.

attached thereto, and the tenant for life, or any other party to the transaction, shall by mistake, be allowed to receive for his own benefit a portion of the purchase money or value of the timber or other articles, it shall be lawful for the Court of Chancery, upon any bill or claim or application in a summary way, as the case may require or permit, to declare that upon payment by the purchaser or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the Court shall direct, and the settlement of the said principal moneys and interest under the direction of the Court, upon such parties as in the opinion of the Court shall be entitled thereto, the said sale ought to be established; and upon such payment and settlement being made accordingly, the Court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the said application, as between solicitor and client, shall be paid by the purchaser or the claimant under him.

In a case where a man was tenant for life, without impeachment for waste, of a settled estate, with a power of sale in trustees, to which his consent was necessary, the estate with the standing timber was sold, and the trustees received the value set upon the estate; and the tenant for life received the value of the timber, all parties supposing that as he might have cut and sold the timber, he was entitled to the value of it although standing; yet the sale was set aside, and the decree was affirmed in the House of Lords (a). The mistake having been discovered, the tenant for life, before the litigation, invested the like amount in the funds in the names of the trustees upon the trusts of the settlement, but this circumstance was held not to vary the case.

SECTIONS 13, 14, 15, 16, & 17.

13. Where, by any will which shall come into operation after the passing of this Act, the testator shall have charged his real estate or any specific portion thereof, with the payment of his debts, or with the payment of any legacy or other specific sum

Devisee in
trust may
raise money
by sale, not-
withstanding

(a) *Cockerell v. Cholmeley*, 1 Russ. and Myl. 418; 1 Cl. and F. 60.

of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debt, legacy or money as aforesaid by a sale and absolute disposition, by public auction or private contract, of the said hereditaments or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed, may reserve such rate of interest, and fix such period or periods of repayment as the person or persons executing the same shall think proper.

want of express power in the will. Imp. Act 22 & 23 V. c. 35, s. 14.

14. The powers conferred by the last section shall extend to all and every person or persons in whom the estate devised shall for the time being be vested by survivorship, descent or devise, or to any person or persons who may be appointed under any power in the will, or by the Court of Chancery, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid.

Powers given by last section extended to survivors, devisees, &c. Imp. Act 22 & 23 V. c. 35, s. 15.

15. If any testator who shall have created such a charge as is described in the thirteenth section, shall not have devised the hereditaments charged as aforesaid, in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being, named in the will, if any, shall have the same or the like power of raising the said moneys as hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall, for the time being, be vested; but any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate.

Executors to have power of raising money, &c., where there is no sufficient devise. Imp. Act 22 & 23 V. c. 35, s. 16.

16. Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by sections thirteen, fourteen and fifteen of this act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof.

Purchasers, &c., not bound to inquire as to powers. Imp. Act 22 & 23 V. c. 35, s. 17.

Secs. 13, 14 and 15 not to affect certain sales, &c., nor to extend to devisees in fee or in tail. Imp. Act 22 & 23 V. c. 35, s. 18.

17. The provisions contained in sections thirteen, fourteen, fifteen and sixteen, shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made, under or in pursuance of any will coming into operation before the passing of this act, but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this Act had not passed ; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies ; nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do.

The law on the subject matter of these sections will be found treated of at some length in the works of various text writers (a).

SECTION 18.

In case of limitation to uses they shall take effect as they arise, without continued seizin or *scintilla juris* in the persons originally seized. Imp. Act 23 & 24 V. c. 38, s. 7.

18. Where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seizin originally vested in the person seized to the uses, and the continued existence in him or elsewhere of any seizin to uses or *scintilla juris*, shall not be deemed necessary for the support of, or to give effect to future or contingent or executory uses ; nor shall any such seizin to uses or *scintilla juris* be deemed to be suspended, or to remain or to subsist in him or elsewhere.

Scintilla juris abolished. Much discussion has arisen in determining where the seisin is upon which the statute operates in the case of springing or contingent uses, during their suspense, and when they come into existence ; as, for instance, if an estate were conveyed to feoffees and their heirs to the use of A for life, remainder to the use of his first and other sons (then unborn) in tail, remainder to the use of B in fee. The difficulty arose in this way ; as it was necessary that

(a) Sug. V. & P. 662, 14th ed. ; Sug. Powers, 120-122, 8th ed. ; 2 Davidson Conv. 2 ed. 254, 832-840 ; 2 Jur. N. S. 68 ; Shelford Stats. 494, 7th ed.

there should be a person seised to the use of the person to whom the use was limited, where and how was a seisin to be found in the feoffees to serve the contingent remainders to the first and other sons when they came into existence? Some contended that the legal estate or use continued in the trustees in remainder expectant on the estate of freehold; others, that though the ultimate remainder was in fee, and was executed in B, yet there remained in the feoffees, unexecuted by the statute, a possibility of seisin, or as it was termed, a *scintilla juris et tituli*, to serve the contingent uses as they became vested. A third party contended that the seisin was at once impressed upon all the uses, so that in the case put, B would take a *qualified* though vested estate, subject to be divested upon the birth of a son of A. These questions were of no great practical importance, and are now at rest (a).

19. Any person shall have power to assign personal property, Assignment now by law assignable, including chattels real, directly to himself to self and and another person, or other persons or corporation, by the others. Imp Act 22 & 23 V. c. 35, s. 21. like means as he might assign the same to another.

This section will be of assistance in the case of trust Personal pro- estates, where it is desired to appoint a new trustee to hold property may be jointly with a continuing trustee. If real or personal pro- assigned by property were held by A, or by A and B jointly as trustees, one person directly to and it were desired to appoint C as co-trustee with A in himself and another. the one case, or in the stead of B, who retires, in the other case, two instruments, and the intervention of some third person, were requisite to vest the personalty in A and C. As regards the freehold real estate, one instrument only is requisite, for A can convey by some common law conveyance or statutory grant to C, to the use of A and C jointly,

(a) It is to be hoped that the action of the Legislature was not fore-shadowed to Popham, C. J., by the argument before him, and that the learned Judge was endowed with no mystical lore, when he predicted "that not to cherish the *scintilla juris* would be to cast the whole commonwealth into a sea of troubles, and endanger it with utter confusion and drowning."

and the Statute of Uses would vest the legal estate in them; but, inasmuch as the statute can, as hereafter explained (a), only execute a use when a person is *seised* to to the use, it is entirely inoperative as regards personalty. The consequence was, that before this Act, where the trust estate consisted of freehold and personalty, including leaseholds, the old trustee or trustees conveyed the freehold to the continuing and the new trustee as joint tenants, by one conveyance as before mentioned, but assigned the personalty by another instrument to some third person on trust to re-assign to the continuing and new trustee as joint tenants, who re-assigned accordingly.

The act remedies inconvenience only as regards personalty *by law assignable*; so far as regards choses in action not by law assignable, but of which an assignment is recognized in equity (b), as for instance a mortgage debt, they were nevertheless assigned before the act in ordinary practice, in like manner as personalty assignable at law, coupled however with a power of attorney to sue in the name of the transferors (c). Such a practice does not seem to be necessary, and a simpler form might be adopted (d), for, as observed by Mr. Lewin, equitable interests shift according to intention, and therefore no legislative interference was required as to them (e).

It has been said, that as the Act does not say the assigns shall take as joint tenants, (which tenancy is always advisable in the case of trustees), that its legal operation in that respect has been questioned (f). Con. Stat. c. 82, s. 10, would not apply to cause the trustees to take as joint tenants, as it does not relate to personalty, unless "money to be laid out in the purchase of land, and chattels or other personal property transmissible to heirs." See sec. 14 of that act.

(a) Post, under Con. St. c. 90, s. 13.

(b) See post, under Con. St. c. 90, s. 11.

(c) See Davidson Conv. vol. 2, 2 ed. p. 1074.

(d) See last note. (e) Lewin on Trusts, 5 ed. 462 note.

(f) Davidson Conv. vol 3, 2d ed. p. 30 note p.

SECTION 20.

20. Any seller or mortgagor of land, or of any chattels, real or personal, or choses in action, conveyed or assigned to a purchaser or mortgagee, or the solicitor or agent of any such seller or mortgagor, who shall, after the passing of this Act, conceal any settlement, deed, will or other instrument material to the title, or any incumbrance, from the purchaser or mortgagee, or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall be guilty of a misdemeanor, or being found guilty, shall be liable, at the discretion of the court, to suffer such punishment, by fine or by imprisonment for any time not exceeding two years, with or without hard labour, or by both, as the court shall award, and shall also be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them or either or any of them, in consequence of the settlement, deed, will or other instrument or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree; and in estimating such damages where the estate shall be recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them, or either or any of them, in improvements on the land; but no prosecution for any offence included in this section, against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of Her Majesty's Attorney-General for Upper Canada, or in case that office be vacant, of Her Majesty's Solicitor-General for Upper Canada; and no such sanction shall be given without such previous notice of the application for leave to prosecute, to the person intended to be prosecuted, as the Attorney-General or the Solicitor-General (*as the case may be*) shall direct; and no prosecution for concealment shall be sustained unless a written demand of an abstract of title was served by or on behalf of the purchaser or mortgagee before the completion of the purchase or mortgage.

Punishment of vendor or mortgagor for fraudulent concealment of deeds, &c., or falsifying pedigree.

Imp. Act 22 & 23 V. c. 35, s. 25. and 23 & 24 V. c. 38, s. 8.

Consent of Crown Law Officer to prosecution required.

Independently of this section, the party aggrieved under the circumstances therein named has a remedy, though not The law and remedy apart

from the act, to the extent given by this act. It is said (a) "moral writ-
 in case of sup-ers insist that a vendor is bound, *in foro conscientiae*, to
 pression of acquaint the purchaser with the defects in the subject of
 defects, or the contract. Our law does not entirely coincide with this
 misrepresent-strict precept of morality. If at the time of the contract
 tion. the vendor himself was not aware of any defect in the
 estate, it seems the purchaser must take the estate with
 all its faults, and cannot claim any compensation for them.
 And even if the purchaser were ignorant of the defects, and
 the vendor was acquainted with them, and did not disclose
 them, yet if they were *patent*, and could have been discov-
 ered by a vigilant man, no relief will be granted against
 the vendor; and equity follows the law. But if a vendor
 during the treaty industriously prevent the purchaser from
 seeing a defect which otherwise might easily have been dis-
 covered, he is not entitled to the aid of a court of equity,
 and it is conceived he could not sustain an action against
 the purchaser for breach of the contract." (b) "The vendor
 is bound to deliver to the purchaser the instruments by
 which incumbrances were created, or on which defects
 arise, or to acquaint him with the facts, if they do not
 appear on the title deeds, and the same rule extends to the
 attorney of a vendor who knows of incumbrances. With
 the exception of a vendor, or his agent, suppressing an
 incumbrance, or a defect in the title, a purchaser cannot
 obtain relief against the vendor for any incumbrance or
 defect in the title to which his covenants do not extend;
 and therefore, if a purchaser neglect to have the title inves-
 tigated, or his counsel overlook any defect in it, he may be
 without a remedy" (c). Even after the contract is executed,
 and conveyance and payment made, the purchaser can, in
 case of fraud, obtain relief and have the transaction res-
 cinded in equity (d). The solicitor for the vendor, as well
 as the vendor, is liable at common law, who by misrepres-
 entation induces a person to buy (e).

(a) Sug. Vend. p. 1.

(b) See also Dart Vend. 3 ed. 57; Ferrier v. Peacock, 2 F. & F. 717.

(c) Sug. Ven. 14 ed. pp. 5, 6. (d) Dart Ven. 3 ed. 520. (e) Id. p. 59.

It would seem to be clear that the action at Common Law for fraud or misrepresentation would only lie in favor of the party imposed on, and his personal representatives, and would not run with the land, but the statutory right of action for damages is made, apparently, to run with the land, and placed on much the same footing as a covenant for title. The statutory action runs with the land.

It will be observed the Act limits no time within which an action must be brought, and as it is a new and statutory right, it may be questioned whether the time fixed within which personal actions theretofore recognized must be brought, would be a bar to an action under this Act. No time fixed within which action must be brought.

The Act extends to the concealment of a document, though not in the custody or power of the vendor, for it expressly extends to an *incumbrance*, which cannot be supposed to be in the charge of the vendor. The act extends to concealing documents not in vendor's custody.

The sanction of the Attorney-General is not requisite as to civil actions, nor is it necessary for such that an abstract should have been demanded in writing. This sanction and demand are essential to a prosecution for concealment; but the latter is not required as to prosecution for falsifying a pedigree. As a check on a vendor and his solicitor, and with a view to evidence against them in case of possible concealment, it will always be advisable to demand and insist on an abstract, independently of such being the proper (though perhaps in this country not universal) course of practice. No demand of abstract requisite as to a civil action, or prosecution for falsifying pedigree. Important always to require an abstract.

Where both the vendor and his solicitor being liable for damages for concealment or falsification, the same have been recovered wholly from the solicitor, it may be questionable whether he would have any remedy over against his client, though the latter may have derived the whole benefit resulting from the funds, and the damages were only in proportion to the benefit. In such case the maxims might nevertheless still apply,—“*ex dolo malo non oritur actio*,” and “*in pari delicto potior est conditio defendentis*.” If vendor and solicitor both liable, and full compensation be got from the latter, can he recover from his client?

Can a vendor now suppress a defect, when absence of notice of it would not prejudice the purchaser; or can he now sell under special conditions as to title, and not disclose the defect?

In some respects the Act would seem to interfere with the former law and practice; first, in those cases wherein a defect in title is concealed, knowledge of which would prevent the title being good in the hands of a purchaser for value, and who without notice would take a good title as a purchaser for value; secondly, in those cases wherein vendors have been permitted to sell a title, defective to their knowledge, by the frame of their conditions or contract of sale.

As regards the first case, there are many occasions wherein a vendor may conscientiously and fairly suppress what is, in fact, a defect in the title, but is not such as regards a purchaser for value without notice. Take the case of an unregistered mortgage in fee, which has, in fact, been satisfied, but the proof of which is wanting, and the apparent owners of the charge or mortgage have been silent for years, though not barred by time; here, if the purchaser pays his purchase money, and takes his conveyance without notice and acquires priority of registration, he will not be affected by the mortgage. Still, a vendor, and much more his solicitor, may well hesitate how far they can with safety suppress the mortgage; how far in this or any other case they can be sure the law and the facts will surely so apply as to protect the purchaser, for on his safety depends theirs. Have they foreseen that by possibility the mortgage might be registered between the delivery of the conveyance and its registry, or that if the conveyance were registered defectively, it would acquire no priority over the mortgage? Are they prepared to assume the responsibility of deciding for themselves the difficult law of notice and priorities? It is apprehended that the effect of the Act will be, that defects and incumbrances will, and probably must, be disclosed, which if unknown to the purchaser, would not prejudice him, but being disclosed prevent a sale (a).

The second case above alluded to is that of sale by a title defective to his knowledge, and where, at least, the

(a) *Drummond v. Tracy*, 1 John. 608.

vendor has not himself caused the incumbrance or defect. The law has hitherto permitted sale of such a title, by allowing the vendor in his contract or conditions of sale to stipulate against production of documents, or that the vendor shall not make any objections to the title anterior to a certain date (a). The Act leaves it uncertain whether this can still be done, or rather whether notwithstanding any such conditions of sale, the vendor, under peril of the penalties in the Act, would not have to disclose the defect. Probably the vendor need not disclose the defect.

SECTION 21.

21. In the construction of the previous provisions in this Act, Interpretation of words used in this Act.
the term "land" shall be taken to include all tenements and hereditaments, and any part or share of or estate or interest in any tenements or hereditaments, of what tenure or kind soever; "Lands," and

The term "mortgage" shall be taken to include every instrument by virtue whereof land is in any manner conveyed, assigned, pledged or charged as security for the repayment of money or money's worth lent, and to be re-conveyed, re-assigned or re-released on satisfaction of the debt; and "Mortgage."

The term "mortgagor" shall be taken to include every person by whom any such conveyance, assignment, pledge or charge as aforesaid shall be made; and "Mortgagor"

The term "mortgagee" shall be taken to include every person to whom or in whose favor any such conveyance, assignment, pledge or charge as aforesaid is made or transferred. Imp Act 22 & 23 V c. 35, s. 25. "Mortgagee"

SECTION 22.

22. A power of attorney executed by a married woman for the sale or conveyance of any real estate of or to which she is seized or entitled in Upper Canada, or authorizing the attorney to execute a deed barring or releasing her dower in any lands or hereditaments in Upper Canada, shall be valid both at law and in equity; provided (1) that she be examined and a certificate indorsed on the power of attorney, as required in regard to deeds and conveyances by a married woman, under the Consolidated Statutes for Upper Canada respectively, intituled: *An Act* Powers of Attorney executed by married women.

(a) Davidson Conv. vol. 1, 3 ed. p. 538, title, conditions of sale.

respecting Dower, and An Act respecting the conveyance of Real Estate by Married Women; and provided (2) that her husband is a party to and executes such power of attorney or the deed or other instrument executed in pursuance thereof, where the power is for the sale or conveyance of her real estate.

Section 22 is treated of in considering Con. St. U. C. ch. 85, as to conveyances by married women.

SECTIONS 23 & 24.

As to a power of attorney provided expressly to be executed after decease of constituent.

23. In case a power of attorney for the sale or management of real or personal estate, or for any other purpose, provides that the same may be exercised in the name and on the behalf of the heirs or devisees, executors or administrators of the person executing the same, or provides by any form of words that the same shall not be revoked by the death of the person executing the same, such provision shall be valid and effectual to all intents and purposes both at law and in equity, according to the tenor and effect thereof, and subject to such conditions and restrictions, if any, as may be therein contained.

As to things done and powers of attorney after the decease, &c., of constituents, without such special provisions.

24. Independently of any such special provision in a power of attorney, every payment made and every act done under and in pursuance of any power of attorney, or any power, whether in writing or verbal, and whether expressly or impliedly given, or an agency expressly or impliedly created after the death of the person who gave such power or created such agency, or after he has done some act to avoid the power or agency, shall, notwithstanding such death or act last aforesaid, be valid as respects every person party to such payment or act, to whom the fact of the death, or of the doing of such act as last aforesaid was not known at the time of such payment or act *bond fide* done as aforesaid, and as respects all claiming under such last mentioned person.

The Imp. Act

The Imperial Act 22 & 23 Vic. c. 35, s. 26, is by no means so extensive as this section, and extends only to trustees, executors and administrators.

A power was revoked at law by the

A power of attorney was, at law at least, revoked by death of the donor thereof, though acted on *bond fide* with-

out knowledge of the death (a); but this rule has not prevailed in all cases in Equity, especially where a valuable consideration has passed; and, as against persons claiming under the donor of the power, acts *bond fide* done, have been held upheld after death of the donor (b).

The Act would not protect in cases where the donor of the power himself had but an interest determinable by his death, as in the case of a tenant for life.

SECTION 25.

25. Where an executor or administrator, liable as such to the rents, covenants or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease, or agreement for a lease, as may have accrued due and been claimed up to the time of the assignment hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease, or agreement for a lease, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased, to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be) of the personal estate of the deceased, to meet any future liability under the said lease, or agreement for a lease; and the executor or administrator so distributing the residuary estate, shall not, after having assigned the said lease, or agreement for a lease, and having where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease, or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor, or those claiming under him, to follow the assets of the deceased into the hands of the person or

death of the donor, but in equity, in certain cases, acts *bond fide* done were upheld.

The Act does not protect where the interest of the donor determined by his death.

As to liability of executor or administrator in respect of rents, covenants, &c.

Imp. Act 22 and 23 V. c. 35, s. 27.

(a) Co. Litt. 52 b; per Lord Ellenborough, 4 Camp. 272; *Houstoun v. Robertson*, 6 Taun. 448; see also, *Re Jones* 3 Drew. 679.

(b) *Campbell v. Anderson*, 4 Bligh, N. R. 513; *Ex parte MacDonnell*, Buck 399; *Bailey v. Collett*, 18 Bea. 179; see also *Kiddill v. Farnell*, 3 S. & G. 434.

persons to or amongst whom the said assets may have been distributed.

The former law as to contingent liabilities,

In Williams on Executors (*a*), referring to the liability of an executor, before the Act, as to contingent claims and the question whether he could safely pay legacies, or deliver over a residue where there was an outstanding covenant of his testator, or bond with a condition, or the like, which had not been, but might be broken, it is said, "it would seem when such liabilities exist, an executor is not bound to part with the assets either to a particular or residuary legatee without a sufficient indemnity; and that a Court of Equity will not compel him to do so without such indemnity, or without impounding a sufficient part of the residuary estate for that purpose; for otherwise, if the contingent covenants, &c., should afterwards be broken, the executor would be liable, according to the above decision (*b*), to answer the damages *de bonis propriis*, without any fault in him."

and payment of legacies before debts of which executor has no notice.

"Authorities appear to demonstrate that the mere circumstance of want of notice of a debt or claim against the estate of the deceased, will not excuse an executor from the payment or satisfaction of it, if the assets were originally sufficient for the purpose, notwithstanding that in ignorance of it, he has *bond fide* handed over the assets to legatees or parties entitled to distribution. But it seems to have been considered in some cases, that lapse of time may operate as a waiver of the right of the creditor or claimant, by way of laches on his part, so as to preclude him from complaining of the insufficiency of the assets (*c*)."

Protection under ss. 27, 31.

If, however, the executor or administrator proceed in compliance with sec. 27, he will be entitled to the same protection as if he had administered under decree of the Court (*d*); and in many cases he might find it advisable to ask advice of the Court, under sec. 31. If compelled to pay

(*a*) 6 ed. 1246.

(*b*) *Pearson v. Archdeaken*, 1 Al. & Nap. 23.

(*c*) *Wms. Exrs.* 6 ed. 1254. (*d*) *Clegg v. Rowland*, L. R. 3 Eq. 368.

a claim of which he had no notice, after having distributed, he has a remedy over against the legatees to refund; and the creditor himself may follow the assets in the hands of the legatees without proceeding against the personal representative (a). Executor can compel legatee to refund, and the creditor can follow the assets.

This section is retrospective in its operation (b).

This section retrospective,

The Act extends apparently only to the case of the personal representative himself having assigned the lease to a purchaser (c), and thus it would not take in the case where the testator or intestate being lessee, and having covenanted, had himself assigned the lease; nor the case wherein the lessee's interest should have been specifically bequeathed, and have become vested in the legatee on the assent of the executor; nor where it has been transferred on distribution of the estate.

Cases to which it does not extend.

Where the testator or intestate is not lessee, but assignee of the lease, there is no necessity for applying the provisions of the Act, as in such case, not being liable on any privity of contract, but merely by privity of estate, and so liable only for breaches of covenants running with the land during the continuance of privity of estate, the executor or administrator is relieved from future responsibility simply by assigning the estate. This, of course, would not suffice where the testator or intestate is lessee, and has covenanted, for though on assignment the privity of estate would be discharged, yet the privity of contract would remain, and the covenant could be sued upon, even though the lessee should have accepted the assignee as his tenant (d). Where, however, the testator or intestate, having been an assignee of the lessee, has assigned the lease, and so has become relieved from liability for future breaches of covenant, it may yet be that the personal representative would be liable for such breaches, if the testator had, (as is not

Where testator is an assignee, no necessity for applying this section; but

if the testator on becoming assignee have covenanted to indemnify his assignor, and has afterwards assign-

(a) 2 Wms. Exrs. 1344. See post remarks under s. 27.

(b) In re Green, 2 De Gex, F. & J., 121; Smith v. Smith, 1 Dr. & Sm. 384; Dodson v. Sammell, 1 Dr. & Sm. 575; 9 W. R. 887.

(c) Dodson v. Sammell, 9 W. R. 887.

(d) See notes to Spencer's case, 1 Smith, Lg. Ca.; Montgomery v. Spence, 28 Q. B. U. C. 39.

ed, will this unusual), on the assignment covenanted with the lessee to Act apply indemnify him; on such a liability it is not clear that this *quoad* that covenant? section would apply.

If the personal representative comply with the Act, and assign the lease to a purchaser, and, where there may be future claims for *fixed sums* to be laid out on the land, set apart a fund to meet them, he may distribute without regard to future claims not fixed or unascertained under the lease, and without being *personally* liable for such claims. If, however, after distribution, there should be a breach of any of the testator's or intestate's covenants in the lease, not provided for by the fund as not being of a fixed or ascertained character, as, for instance, a covenant to repair, and the representative should have notice of such breach, it would seem he could not distribute further assets which may have come to his hands since the first distribution had before breach, without regard to the claim under such breach.

If after compliance with the act, and distribution, there should be a breach of a covenant of testator, and further assets come in, the claim on the covenant must be regarded before further distribution.

SECTION 26.

As to liability of executor in respect of rents, &c., in conveyances on rent charge

Imp. Act 22 & 23 V. c. 35, s. 28.

26. In like manner where an executor or administrator, liable as such, to the rent, covenants or agreements contained in any conveyance on chief rent or rent-charge, (whether any such rent be by limitation of use, grant or reservation,) or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate, whose estate is being administered, shall have satisfied all such liabilities under the said conveyance, or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance herein-after mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased, to meet any

future liability under the said conveyance, or agreement for a conveyance; and the executor or administrator so distributing the residuary estate, shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance, or agreement for conveyance; but nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed.

Some of the observations made above as to section 25 apply to this section.

A rent charge, created by limitation of use in favor of, or in a grant to, or by way of reservation in a conveyance by, the testator or intestate, is spoken of in this section. Rent charge,
how created.

Since the Stat. *quia emptores* a man can no longer make over his whole estate leaving in himself no reversion, and reserve thereon a rent to himself *quod rent service*, for which, as in the ordinary case of landlord and tenant, distress may be had as of common right. That Statute abolishing subinfeudation and causing the assignee to hold of the superior lord, prevented any tenure between the assignor and assignee, and thus there can be no rent service. If rent be reserved on such an assignment it will operate as a *grant* by the assignee, of a rent charge, which, if no power of distress thereupon be granted, will be a rent seck, and may be distrained for if brought within s. 5 of 4 Geo. 2, c. 28. Assignment
with reserva-
tion of rent.

A rent charge may also be created by limitation of use, as on a grant to A and his heirs to the use that the grantor and his heirs may have thereout yearly a certain rent, to which are sometimes added further uses, as to re-enter and hold till payment after default, and, subject to such use, to the use of A and his heirs. Here the St. of Uses (ss. 4, 5) operates, and the person in whose favor the use is declared, has, by the statute, seisin and possession of the rent, with power to distrain (a). Rent charge
by limitation
of use.

(a) See the language of the Act, post p. 56.

It is not uncommon in some parts of England to convey building land in fee, in consideration of a perpetual rent charge reserved or limited by way of use to the party conveying, with a covenant for payment.

Difficulty in applying this section.

This section can have little application in this country, even in England it is difficult to see how it can apply to those cases above referred to, of conveyances in fee, which the Act was chiefly intended to meet. The personal representative as such has no power to convey a freehold interest, and therefore cannot place himself in a position to obtain the benefit of the Act, which requires a conveyance by him. Possibly an executor might, under the will, have power given him to sell, but an administrator never can sell a freehold.

SECTION 27.

As to distribution of the assets of testator or intestate after notice given by executor or administrator. Imp. Act 22 & 23 V. c. 35, s. 29.

27. Where an executor or administrator shall have given such, or the like notices, as in the opinion of the Court in which such executor or administrator is sought to be charged, would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets, or any part thereof, so distributed to any person of whose claim such executor or administrator shall not have had notice of (a) the time of distribution of the said assets, or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, into the hands of the person or persons who may have received the same respectively.

Contingent claims provided for by Imp. St. 13 & 14 Vic. c. 35.

The Imperial Act of 13 & 14 Vic. c. 35, ss. 19 *et seq.* has provisions bearing on the subject matter of this section, and provides especially as to a fund to be set apart for contin-

(a) At ?

gent claims (a). The position of the executor as regards contingent claims of which he had notice, was before referred to in treating of section 25.

It would seem that it is not absolutely necessary for a creditor to send in his claim, if the executor or administrator have notice of it. Executor having notice of a debt, &c. not sent in.

If after distribution, further assets should come to the hands of the executor, they will be liable to a creditor who may have sent in his claim after the distribution, or of whose claim the executor has since then had notice. If after distribution further assets come in, liable to subsequent claims.

Where part of the assets are paid or handed over to next of kin or legatees, and part retained by the executor on distribution, as being the share or legacies of others entitled, and the executor has so acted that the payments made, or assets handed over have been properly made or handed over, the right of a creditor subsequently claiming as to the part retained is subject to some difficulty. Where payments have been made or assets distributed, *by direction of the Court*, and part retained in Court to answer the share of infants, or legatees, it has been held that a creditor coming in after the distribution can claim of the amount retained, only such proportion as it bears to the whole amount available for distribution (b). Claims of creditors coming in when some of next of kin or legatees satisfied and shares or legacies of others retained. When distribution made under decree of the court;

Where, however, the partial distribution had not been had by direction of the Court, it would seem that before the Act a creditor, guilty of no laches, could insist on payment of his claim to the full extent of the amount retained (c); and the next of kin or legatees thus prejudiced, or deprived of their shares or legacies, would be left to their remedy over for contribution against the other legatees or next of kin. when not under decree,

(a) See *King v. Malcott*, 9 Hare, 692; *Brett v. Carmichael*, 14 Law T. N. S. 820, Ld. Romilly, as to setting apart a fund.

(b) *Gillespie v. Alexander*, 3 Rus. C. C. 130; *Greig v. Somerville*, 1 Rus. & M. 338. See, however, *Davies v. Nicholson*, 2 De G. & J. 693, as to the right of the creditor where the estate was not administered by the Court, and where the facts were before the provisions of this Act.

(c) *March v. Russell*, 3 M. & Cr. 31; *Davies v. Nicholson*, 2 De G. & Jones, 693.

Where the executor no longer holds as such, but as trustee.

It has been held, however, that where the executor no longer held the amount retained, in the character of executor, but had constituted himself trustee for the parties entitled, (a) that this would be equivalent to payment, so as to preclude the creditor from looking to the executor, as such, as having assets on hand to the extent of the amount retained, as to which he had become trustee.

Execr. proceeding in compliance with this section has the same protection as if under decree.

An executor who has distributed the assets, after issuing advertisements in compliance with this section, will have the same protection as if he had administered under decree of the Court (b).

The notices to be given.

The Act requires as a condition of its protection, that such and the like notices shall be given as *in the opinion of the Court in which the executor is sought to be charged* would have been given by the Court of Chancery in an administration suit. The proceedings in administration suits, and the notices to be given, are regulated by the orders in Chancery, 467 *et seq.* (c). The number of notices to be given, mode and place of publication, &c., depends on the circumstances of each case, regarding the nature of the business, domicile, knowledge or probability of there being foreign creditors, &c., (d). In ordinary cases, when there is no reason to suppose that there may be creditors residing at a distance, six weeks advertisement in a newspaper published in the county wherein the deceased died domiciled, is sufficient.

It is of the utmost importance, with a view to obtaining the protection of the Act, that the executor should not only give, but also preserve evidence of having given, such notices as would be deemed proper in the circumstances of the case; and that he should not proceed to distribute with undue haste. The Act, it will be seen, points out no time

(a) See remarks p. 38, under sec. 30 of this Act.

(b) Clegg v. Rowland, L. R. 3 Eq. 368; and see King v. Malcott, 9 Hare, 692.

(c) See Taylor's Chan. Orders.

(d) See Brett v. Carmichael, 14 L. T. N. S. 820, as to setting apart a fund to meet possible claims.

within which distribution may be made. The party distributing must take on himself the responsibility of being able to satisfy the Court in which he may afterwards be sought to be charged. Possibly, under these circumstances, and considering that in cases of difficulty it is impossible to lay down any general rule, the executor might obtain the advice and assistance of the Court, under sec. 31, as to the notices to be given, the time of distribution, and the necessity for setting apart a fund to meet contingent claims of which he may have notice.

In cases of doubt as to notices, time of paying in, advice to be asked under s. 31.

Creditors who have sent in their claims should be careful to preserve evidence of having done so.

SECTION 28.

28. On the administration of the estate of any person dying after the passing of this Act, in case of a deficiency of assets, debts due to the Crown, and to the executor or administrator of the deceased person, and debts to others, including therein respectively debts by judgment, decree or order, and other debts of record, debts by specialty, simple contract debts, and such claims for damages as by statute are payable in like order of administration as simple contract debts—shall be paid *pari passu* and without any preference or priority of debts of one rank or nature over those of another; but nothing herein contained shall prejudice any lien existing during the lifetime of the debtor on any of his real or personal estate.

In case of deficiency of assets, certain debts to rank *pari passu*, and without priority over each other.

Exception.

Possibly this section does not deprive a creditor of priority to be obtained by first suing or obtaining judgment, notwithstanding the enjoining that the debts referred to "be paid *pari passu*," and that the law in that respect remains unchanged; the only effect of the Act being to abolish the theretofore existing "preference or priority of debts of one rank or nature over those of another," and place all creditors in the same degree. The law had always been that if one of several creditors in the same degree sued and obtained judgment against the executor, his claim had to be satisfied before the others. And if one creditor commenced an action of which the executor had notice, he could

Can a creditor still acquire priority by first suing or getting judgment?

make no *voluntary* payment to another of the same degree, but if that other commenced a subsequent action, and first got judgment, he was entitled to the first payment (*a*). It would seem that the law as above is not varied by this act.

Can the executor still prefer himself?

If this be so, it would seem to follow that an executor has still the right of retainer and preference as to a debt due himself, and that he has even greater privileges than before the Act, inasmuch as then he could prefer himself only among those of equal degree; whereas now, as the Act places all in equal degree, he can prefer himself, though a mere simple contract creditor, even against the Crown. Still the matter is not quite clear.

SECTION 29.

If an executor or administrator rejects a claim, suit must be brought within a certain period, or be barred.

29: In case the executor or administrator gives notice in writing to any creditor or other person of whose claims against the estate such executor or administrator has notice, or to the attorney or agent of such creditor or other person, that the said executor or administrator rejects or disputes such claim, it shall be the duty of the claimant to commence his suit in respect of such claim, within six months after such written notice was given, in case the debt, or some part thereof, was due at the time of the notice, or within six months from the time the debt, or some part thereof, falls due, if no part thereof was due at the time of the said notice, and in default the said suit shall be forever barred.

This is a provision much for the benefit of legatees, and facilitates the winding up the estate. The Act as to Quietting Titles proceeds on somewhat the same principle, in enabling a person to force an adverse claimant to have his claim adjudicated on or be barred.

The case of a claimant issuing a writ and keeping it renewed without serving it.

It might perhaps have been proper to have provided that the suit should be prosecuted "without delay," as is required in replevin, for the letter of the Act may be complied with by merely issuing a writ, and the spirit and intention of the Act frustrated by not serving the writ, and yet keep-

ing it constantly renewed. If however the executor can properly appear to the writ without service of it, which it is said he may do (*a*), the difficulty would be obviated, as the practice of the Courts requires that proceedings subsequent to appearance shall be within definite periods.

SECTION 30.

30. After the first day of January, one thousand eight hundred and sixty-six, no suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate of any person dying intestate, possessed by the legal personal representative of such intestate, but within the time within which the same might be brought to recover a legacy, that is to say, within twenty years next after a present right to receive the same, shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case, no such action or suit shall be brought but within twenty years after such accounting, payment or acknowledgment, or the last of such accountings, payments, or acknowledgments, if more than one was made or given.

After 1st of Jan., 1866, a suit to recover personal estate of an intestate, or any part thereof, must be brought within the same time as a suit for a legacy.
Imp. Act 23 & 24 V., c. 38, s. 13.

The corresponding Imperial Act 23 & 24 Vic., c. 38, recites sec. 40 of c. 27, 3 & 4 Wm. IV., (Con. St. c. 88, s. 24,) and that it is expedient that that enactment should extend to cases of intestacy. The Consolidated Statute applies to a legacy payable solely out of personal estate (*b*); and to a residue bequeathed by will of personal estate, (*c*); but it does not apply to a case of intestacy, or a partial intestacy, as a residue not disposed by the will of a testator; and the present section does not, expressly at least, take in

The corresponding Imp. act.

Con. St. c. 88, s. 24.

Does this section apply to an undisposed of residue?

(a) Lush Pr. 3 ed. 392.

(b) Sheppard v. Duke, 9 Sim. 567; Ashwell's Will, John. 112; Bullock v. Downes, 9 H. of L. 14.

(c) Prior v. Horniblow, 2 Y. & C. 200; Christian v. Devereux, 12 Sim. 264. See also the cases in Wms. Exrs. 6 ed. 1874.

the latter case. It applies to assets distributed by an administrator, but not to assets retained by him, at least if the existence of such assets were unknown (*a*).

Cases wherein an executor who has assumed character of trustee held not entitled to benefit of act.

What acts invest an executor with the character of trustee.

There are cases (*b*) decided on the Act of William, wherein the benefit of that Act has been denied to an executor who has become clothed with the character of a trustee, in which event the ordinary rule applies that as between trustee and *cestui que trust* time is not a bar. The difficulty arises however to ascertain when the executor can no longer be regarded merely as such and becomes trustee (*c*). It is said (*d*), this "is, it seems, in the case of a legacy, effected by any act which amounts to an assent to the legacy (*e*), and in the case of a residue, by its being ascertained without more specific appropriation, but not until it has been ascertained." As regards the case of a residue, however, there is a discrepancy between the various decisions (*f*). If the legacy is bequeathed *simpliciter*, and not to the executor on trust, still, if the executor by any act of his constitute himself trustee for the legatee, the principle of *Phillipo v. Munnings*, will apply (*g*).

SECTION 31.

Trustee, executor, &c., may apply by petition to Judge of Chancery for opinion, advice, &c., in

31. Any trustee, executor or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the Court of Chancery, or by summons upon a written statement to any such Judge in Chambers, for the opinion, advice, or direction of such Judge on any question respecting the

(*a*) *Reed v. Fenn*, 35 L. J. Ch. 464.

(*b*) *Phillipo v. Munnings*, 2 My. & Cr. 309. See *Harcourt v. White*, 28 Bea. 303.

(*c*) See *Smith v. Day* 2 M. & W. 684; *Clegg v. Rowland*, L. R. 3 Eq. 368; *Ewart v. Gordon*; *Ewart v. Dryden*; *Ewart v. Snyder*, 13 Grant, 40, 50, 55; *Smith v. Smith*, 1 Drew. & Sm. 384.

(*d*) *Darby on Limitations*, 119.

(*e*) *Dix v. Burford*, 19 Bea. 409. See judgment in *Brougham v. Poulett*, 19 Bea. 133, 134.

(*f*) *Wilmott v. Jenkins*, 1 Bea. 401; *Davenport v. Stafford*, 14 Bea. 319; *Bullock v. Downes*, 9 H. L. Ca. 1; *Dinsdale v. Dudding*, 1 Y. & C. C. 265.

(*g*) *Tyson v. Jackson*, 30 Bea. 384; see also *Clegg v. Rowland*, L. R. 3 Eq. 368.

management or administration of the trust property or the assets of any testator or intestate; such petition or statement to be accompanied by a certificate of counsel, to the effect that in his judgment the case stated is a proper one for the opinion, advice, or direction of the Judge under this Act, and such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application or such of them as the said Judge shall think expedient; and the trustee, executor or administrator acting upon the opinion, advice or direction given by the said Judge, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator, in the subject matter of the said application; Provided, nevertheless, that this Act shall not extend to indemnify any trustee, executor or administrator in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee, executor, or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction; and the costs of such application as aforesaid shall be in the discretion of the Judge to whom the said application shall be made.

In Lewin on Trusts it is said that, "in proceeding under this enactment there is no investigation of facts, but the correctness of the petition or statement is assumed, and if there be any *suppressio veri*, or *suggestio falsi*, the order of the Court, *pro tanto*, is no indemnity to the trustee." No affidavits therefore ought to be filed, and the costs of them would be disallowed (a). It would seem that the order of the Court will be no indemnity, even though the mistake or concealment were not wilful (b): the language of the proviso affords, however, a strong argument against this view.

The Court will not advise on questions of construction, or difficult questions of law, affecting the rights of the parties interested (c), nor on matters of detail which cannot

(a) *Re Muggeridge's Trusts*, 1 John. 625; *Re Mockett's Will*, ib. 628; *Re Barrington's settlement*, 1 John. & H. 142.

(b) *Re Barrington's settlement*, supra, per Wood, V. C.; *Re Dennis Will*, 5 J. N. S. 1388, per Stuart, V. C.

(c) *Mockett's Will*, supra; *Re Hooper's Estate*, 9 W. R. 729; *Re Lorenz's settlement*, 1 Drew. & Sm. 401; *Re Evans*, 30 Bea. 232.

be properly dealt with without the superintendence of the Court, and the assistance of affidavits (*a*),

Cases wherein the court will advise.

The Court will advise as to investment of trust funds, payment of debts, questions as to relinquishing or compromising doubtful claims, postponement of conversion, propriety of conversion of raw material into manufactured articles (*b*), and matters of that character; It would seem also that executors and administrators might, in cases of difficulty, properly ask advice as to notices to be given, and time of distribution, under sec. 27 (*c*), and the necessity for setting apart a fund to meet contingent claims (*d*).

The petition.

The petition should state distinctly the particular question whereon advice &c. is sought, and not merely state the facts, and ask for advice generally, (*e*)

Service of petition.

It has been held that the petition should not, in the first instance be served on any one, but that application should be made in Chambers as to the parties on whom service should be made (*f*). But Kindersly, V. C., stated that the Judges had agreed on a different practice, and held that the petitioner must serve such as he thinks proper, and not bring on the petition merely with a view to ascertain who should be served (*g*).

Petition of one of several interested.

The Court will act on the petition of a *cestui que trust* (*h*), or of one of several trustees (*i*).

Section is retrospective.

This section applies to cases arising on instruments executed before the Act (*k*).

SECTION 32.

Every trust instrument to be deemed to contain clauses for the in-

32. Every deed, will, or other document creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following, that is to say :—

(*a*) Re Barrington's settlement, 1 Johns. & Hem. 142.

(*b*) Re Caldwell Estate, 2 Ch. Chamb. Rep. 150.

(*c*) See remarks on that section. (*d*) See remarks on sec. 25.

(*e*) Re Lorenz, *supra*. (*f*) Re Muggeridge, *supra*.

(*g*) Re Green, 6 J. N. S. 530. (*h*) Re Ward, 14 W. R. 96.

(*i*) Re Muggeridge, *supra*. (*k*) In re Simson, 1 John. & H. 89.

"That the trustees or trustee, for the time being, of the said deed, will or other instrument, shall be respectively chargeable only for such moneys, stocks, funds, and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited; nor for the insufficiency or deficiency of any stocks, funds, or securities; nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being, of the said deed, will or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will or other instrument."

demnity and
reimbursement of the
trustees.
Imp. Act 22
& 23 V. c.
35, s. 31.

In the Bill, as introduced by Lord St. Leonards, the section corresponding to this contained a declaration that the clause referred to should be *construed favorably to trustees*, which declaration was in fact the *gist* of the proposed enactment, for reasons which will presently appear. This declaration was, however, struck out in the Commons, though the whole section was introduced simply with a view to its enactment (a).

The gist of
the Imp. en-
actment was a
clause that it
should be
construed
favorably to
trustees.

The clause referred to in this section has been commonly used by conveyancers for many years, but latterly it has met with disapproval as tending to mislead. It has been said that the clause adds nothing to the security of the trustee; that equity infuses such a proviso into every trust deed, and that the Court has regarded it as immaterial whether a trust deed contains such a provision or not (b). It is superfluous where there is no default, and unavailing where there is. Thus where a trustee signs a receipt with a co-trustee for the sake of conformity merely, (the person paying being entitled to, and indeed secure only on, the joint receipt) (c), he could always shew that he was not

The indemni-
ty professed
to be given
not to be
relied on.

(a) Sugden Stat. 2 ed. 323.

(b) Lewin on Trusts, 3 ed. 317.

(c) See remarks on s. 9 of Con. Stat. 90, p. 44, nob.

chargeable for the receipt of the moneys, and that they were in fact received by his co-trustee : on the other hand, if he unnecessarily allow his co-trustee to retain the money, or do not see to its proper application and investment, this section will not protect him on loss consequent on such neglect (a), "nor will the protection purporting to be given in respect of the insufficiency and deficiency of securities, and in respect of any other losses not happening through the wilful default of the trustees, in any manner exonerate them from the diligence and vigilance which they are bound to use, as well in respect of the selection of investments, as in other matters pertaining to the trust." (b).

In one case (c) the indemnity clause was to the effect given in this section, and to it was added "that no trustee paying or consenting to the payment to a co-trustee, with a *bond fide* intention of accelerating the trust, shall be responsible for the conduct or misconduct of the trustee receiving the same, nor answerable for his application or misapplication of such money, or any part thereof." A suit was instituted charging the trustee with breaches of trust, whereby the trust funds had been lost ; what the particular breaches were does not appear. The defendant said he took no more than a formal and nominal part in the trust, but admitted that he had signed some receipts, after signature by his co-trustee, which enabled the co-trustee to receive the money ; and he relied on the indemnity clause. The following is the judgment of the Master of the Rolls : "I am of opinion that this clause does not exonerate a trustee from the consequences of any acts by which the money has been misapplied. This clause is constantly brought forward to sanction the misapplication of trust moneys, but until it is provided by the instrument creating the trust, that the trustee shall be liable for no breach of trust, provided he does not obtain a personal advantage, I shall not consider

(a) See Lewin on Trusts, 3 ed. 305 ; see also notes to *Townley v. Sherborne*, and *Brice v. Stokes*, 2 W. & T. Lg. Ca. Eq. 793.

(b) *Davidson Conv.* Vol. 3, 2 ed. 182.

(c) *Brumridge v. Brumridge*, 27 Bea. 5.

the clause as giving a trustee the right or liberty of conniving at a breach of trust. Even if an instrument containing such an inconsistent clause were brought before me, I express no opinion on the result; but until it is, I cannot allow a trustee to say, that it is not his business to act properly in the performance of his duty as trustee. The defendant is liable, because, by signing the receipt, he has enabled his co-trustee to obtain and misapply the trust money."

It may be gathered from what is above stated that the clause in question does not vary the law for the protection of trustees; it is important that the law on the subject should be known, as it is said that the clause tends to mislead by its being taken by trustees in a strict literal sense (a). The above cases are based on the principle that a trustee should either decline the trust, or resign it, unless he is prepared to devote to it as much attention as he would to his own affairs, or rather, perhaps, as an ordinarily careful and prudent man would to his own affairs (b). Still, as above stated, Lord St. Leonards had in view in introducing the

(a) 3 Davidson Conv. 2 ed. 184.

(b) In *Bostock v. Floyer*, L. R. 1 Eq. 26, a trustee had handed a sum of £400 to his solicitor, a man of "good repute and extensive practice," as stated in the report, to invest. The solicitor professed to have invested the sum, and handed the trustee a bundle of deeds, &c., relating to the title, including a document purporting to be a copy of court roll, and to shew that one Stephenson had made a surrender of the copyholds in question to the trustee as security for the £400. From the time of the alleged investment, in 1853, to the death of the solicitor, in 1863, the interest was regularly paid through the solicitor. Nothing appeared in the lifetime of the solicitor to raise any doubts as to his integrity; but shortly after his death it was discovered that he had been guilty of gross fraud, had never advanced the money to Stephenson, and that no surrender had in fact been made by Stephenson. There was no receipt by Stephenson for the money among the papers handed over by the solicitor to the trustee. The Master of the Rolls in giving judgment said: "The case is too clear for argument; the liability of the trustee is a matter of every day occurrence in the Court. If the trustee had handed over the £400 to the solicitor, and he had not invested it at all, but simply retained it for his own use, there could be no doubt of the trustee's liability. This is simply the case of a person employing his servant to do an act, and the servant deceiving him; and any loss so occasioned must fall on the employer, and not on the *cestui que trust*. Of the two innocent persons, therefore, one of whom must suffer by the wrongful act of the solicitor, the loss must fall on the trustee who employed him, and did not

section corresponding to this, that the law should be relaxed in favor of trustees (a); and the English Legislature has recently conferred benefits in aid of informal conveying, and powers on those occupying a fiduciary position (b).

SECTION 33.

In case of persons dying after 31st December, 1865, mortgages on his real property to be

33. When any person shall, after the thirty-first of December, one thousand eight hundred and sixty-five, die seized of or entitled to any estate or interest in any land or other hereditaments, on which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such

take all the precautions he might have taken against being deceived. The fund must be replaced with interest at 4 per cent."

In the same case the Master of the Rolls referred to another of a similar nature, which had been before him, as follows: "The solicitors, exercising every possible precaution, found what appeared to be an unimpeachable security on freeholds vested in A. B. in fee simple; but the title to which depended on a forgery by A. B. In that case I had considerable doubt whether the trustee could be made liable for the loss occasioned; but I was not called on to decide the point."

In *ex parte Lewis*, 1 Gl. & J. 69, assignees of a bankrupt put up the estate in two lots, and bought them in *bona fide*; afterwards, on a resale, there was a gain on one lot and a loss on the other, the balance on the whole being in favor of the estate; they were compelled to account for the diminution of price on the one lot without being allowed to set off the increase on the other. In *Lewin on Trusts*, it is said that the same principle was applied to trustees in *Taylor v. Tabrum*, 6 Sim. 281. In England, in cases of this nature, trustees are protected by 23 & 24 Vic.c. 145, secs. 1 & 2.

In *Robinson v. Robinson*, 11 Bea. 371, it was held that where trustees had made several distinct investments not authorized by the trust, on some of which a loss had occurred, and on others a gain, that they should be charged with the loss, and also account for the gain, without any right of set off. This case was reversed on another point, not, however, affecting the decision on this question. The principle of this case is that the trustee shall derive no benefit whatever, directly or indirectly, from a dealing with trust funds, or from a breach of trust, and that by being allowed to set off he would virtually either not have been made responsible for the breach of trust, or have profited by his dealing with the funds. Lord St. Leonards, in 1859, introduced a bill to relieve in such cases; (*W. & T. Lg. Ca. Eq. vol. 2, 2 ed. 748*); and considering the difficulty there sometimes is in knowing on what securities trustees may invest under the various clauses for investment, without being guilty of a breach of trust, (*Mant v. Leith*, 15 Bea. 524), the case has an appearance of hardship.

(a) A Bill was also introduced by Lord St. Leonards, in 1859, to allow trustees to set off gains against losses on investments not authorized by the trust.

(b) Imp. Stat. 23 & 24 Vic. c. 145.

person shall not, by his will or deed, or other document, have paid out of signified any contrary or other intention, the heir or devisee to such property whom such land or hereditaments shall descend or be devised, and not out of shall not be entitled to have the mortgage debt discharged or estate. satisfied out of the personal estate, or any other real estate of such Imp. Act 17 person, but the lands and hereditaments so charged shall, as & 18 V., c. 113. between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof; Provided Proviso. always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debts, either out of the personal estate of the person so dying as aforesaid or otherwise; Provided also, that nothing herein contained shall affect Proviso. the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the first day of January, one thousand eight hundred and sixty-six.

This section is taken from an Imperial Act commonly known as Locke King's Act.

Prior to the Act, in accordance with the general rule that The old law. the personal estate is the primary fund for payment of debts, the heir-at-law or devisee was entitled to have the mortgage debt paid out of such estate, and the land thus exonerated, if the debt were of the devisor's or testator's own contracting or had been adopted by him as his own (a).

The Act extends only to "any estate or interest in any lands or other hereditaments," and therefore as regards property not within those terms the law remains as before.

The section does not extend to leaseholds (b), by reason of its referring to descent and devise, heir and devisee; This section does not apply to chattels real, and the 21st section would not make it so apply.

It does not apply to the lien of a vendor for unpaid purchase money (c), and such a lien is not a "mortgage" within or's lien,

(a) As to what does or does not amount to an adoption of the debt, see notes to *Duke of Ancaster v. Mayer*, 1 W. & T. Lg. Ca. 580.

(b) *Solomon v. Solomon*, 10 Jur. N. S. 331.

(c) *Hood v. Hood*, 3 J. N. S. 684.

the Act; but it applies to an equitable mortgage by deposit of title deeds (a).

nor to a mere indefinite general charge on realty in aid of personalty.

It applies only where there is a defined and specific charge on a specified estate; and a general charge on real estate by a testator in aid of his personal estate, does not come within the definition of a "mortgage" on the real estate in the hands of the devisee, unless and until the amount has been accurately defined, and the devisee has expressly taken the estate subject to such ascertained charge (b).

The date of the will.

An heir taking by descent after the operation of the Act will not come within the last proviso, and so will not be entitled to exoneration, though the mortgage reserving the equity of redemption to the mortgagor and his heirs was executed before 1st January, 1866; for he takes immediately from his ancestor, and not under the deed (c): neither would he be so entitled merely because the personalty is bequeathed by a will made before 1866 (d). Where a devisee claims under a will dated before 1866, he will be within the proviso, and entitled to exoneration, though the deviser may have executed another will after that date, which, without affecting the devise, operates as a republication of the will (e).

Signification of "contrary or other intention."

As regards the signification of a "contrary or other intention" in respect of non-exoneration, it has been held that a mere direction by the testator that his debts "shall be paid as soon as may be" (f), or should be paid by his "executors out of his estate" (g), (which would include real estate), or merely "out of his estate" (h), is not a sufficient indication of intention that the mortgaged estate should be exonerated.

(a) *Pembroke v. Friend*, 1 J. & H. 132; *Coleby v. Coleby*, L. R. 2 Eq. 803.

(b) *Hepworth v. Hill*, 30 Bea. 476. (c) *Piper v. Piper*, 1 J. & H. 91.

(d) *Power v. Power*, 8 Ir. Chan. 340.

(e) *Rolfe v. Perry*, 32 L. J. Cha. 471.

(f) *Pembroke v. Friend*, 1 J. & H. 132.

(g) *Woolstencroft v. Woolstencroft*, 2 De G. F. & Jo. 347; see how ever, per Wood, V. C., in *Pembroke v. Friend*, supra.

(h) *Brownson v. Lawrence*, L. R. 6 Eq. 1.

Where, however, the *personal estate* is bequeathed on trust to pay (a), or the bequest thereof is "subject to the payment of all (the testator's) debts" (b) a sufficient intention is shewn that the mortgage debt shall be paid, and the land exonerated; under a direction to pay debts, mortgage debts are included. In *Fisher on Mortgages*, the law is thus stated: "a bequest of residuary property on trust to sell and pay debts, (even though specialty debts be mentioned which do not include the mortgage debts), (c) or any provision of a separate fund for the debt (d), have been held to shew that the mortgaged estate was exonerated by the fund provided; the circumstances that the testator had not distinguished that debt from other debts, that no special mode of payment had been provided for it, and that the devisee of the mortgaged estate was also an executor who was directed to pay the debts, and the consideration that a gift of property after payment of a debt is a gift of so much only as remains after payment of it, and therefore cannot be claimed by the donee free from it, being considered to strengthen the above conclusion."

It must be borne in mind that English cases on wills executed after 1867 do not apply here, so far as regards a general direction that the debts or all the debts be paid out of personalty, as the Imp. Act 30 & 31 Vic. c. 69, declares that such direction "shall not be deemed a declaration of an intention contrary to the rule [against exoneration—*Ed.*] established by the [prior] act, unless such contrary, or other intention shall be further declared by words expressly, or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate."

Cases in Eng
land on wills
after 1867,
inapplicable
here as re-
gards direc-
tion that debts
be paid out
of personalty,

By the same act the word "mortgage" in the prior act and the same is made to extend to a vendor's lien on lands purchased by as to vendor's
a testator. lien.

(a) *Moore v. Moore*, 1 De G. Jo. & Sm. 602.

(b) *Eno v. Tatham*, 4 Giff. 181; *Mellish v. Vallins*, 2 J. & H. 194.

(c) *Porcher v. Wilson*, 12 W. R. 1001.

(d) *Eno v. Tatam*; *Mellish v. Vallins*; *Moore v. Moore*, *supra*; *Smith v. Smith*, 3 Giff. 263; *Maxwell v. Hyslop*, L. R. 4 Eq. 407.

CON STAT. CH. 90.

An Act respecting the Transfer of Real Property, and the liability of certain interests therein to Execution.

Taken from
Imp. Stat.
8 & 9 Vic. c.
106.

This Act is taken mainly from the Imp. Stat. 8 and 9 Vic. ch. 106; its history is as follows: The Imp. Stat. 7 and 8 Vic., c. 76 was passed, having for its objects some of the features embraced in the later Act, but as it was somewhat faulty, for the reasons given by Mr. Ker in his letter to the Lord Chancellor (*a*), it was repealed by the Stat. 8 and 9 Vic. ch. 106, which was based on the suggestions in Mr. Ker's letter, (indeed framed by him), and which re-introduced in different shape some of the features of the repealed Act and made other new enactments. Our Stat. 12 Vic. ch. 71, was taken from the first Imp. Stat., and was repealed as to most of its clauses by 14 and 15 Vic. ch. 7, which, except in one or two particulars hereafter alluded to, followed the Imp. Stat. 8 and 9 Vic. ch. 106.

SECTION 1.

Interpreta-
tion of certain
words in this
Act.

The words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act excludes such construction, be interpreted as follows, that is to say: the word "Land" shall extend to messuages, lands, tenements and hereditaments, whether corporeal or incorporeal, and to any undivided share thereof, and to any estate or interest therein, and to money subject to be invested in the purchase of land or of any interest therein; the word "Conveyance" shall extend to a feoffment, grant, lease, surrender, or other assurance of land. 12 V. c. 71, s. 1.

(a) See letter in Appendix.

SECTION 2.

2. All corporeal tenements and hereditaments shall, as regards Corporeal the conveyance of the immediate freehold thereof, be deemed to tenements, lie in grant as well as in livery, 14, 15 V., c. 7, s. 2. deemed to lie in grant.

The Common Law loved simplicity and notoriety ; all it required for the creation or transfer of a freehold estate in possession was a mere oral gift, coupled with livery of seisin, the gift being incomplete without livery, unless by way of release or surrender to the next in estate, or by matter of record. Corporeal hereditaments were therefore said to lie in livery. Incorporeal hereditaments of certain kinds, as for instance a freehold remainder *created de novo* out of lands in possession required livery, (a) and the estate arose and took effect out of the seisin of the feoffor, but all existing incorporeal hereditaments, inasmuch as no livery could from their nature be made of them, were *transferred* by way of grant, and were therefore said to lie in grant.

To the perfection of a conveyance by way of grant, a deed was requisite at Common Law (b). After the passing of the Statute of Uses, conveyancers availed themselves of its provisions to avoid the necessity of making livery, and conveyances by way of bargain and sale, and lease and release were adopted. The first of these modes had many disadvantages (c); Bargain and sale. Lease and release. it was ineffective as such, if not based on a consideration of money, or money's worth ; to pass a freehold estate it was necessary by the Statute of Enrolments, 27 H. 8, ch. 10, that it should be by deed, indented and enrolled : general powers, as to appoint or grant leases cannot be engrafted on a bargain and sale, (d) and it is not adapted to certain limitations as by way of shifting or springing use in the usual frame and limitations of marriage settlement. There must

(a) Smith Rl Prop. 655, 3rd ed.

(b) Co. Litt. 9 b, 172a.

(c) As to these and other matters relating thereto, see Blackstone by Leith, p. 298; and, post, remarks under s. 14.

(d) Gilbert Uses, 46; Sugden on Powers, 138; Watk. Conv. 9th ed. 357.

be an estate in the bargainor of which seisin can be had, and not a mere right, contingency or possibility (*a*). For these reasons the conveyance by way of lease and release had in England, at least in all special conveyancing, entirely superseded the bargain and sale; the release operating as a conveyance at Common Law, and not by way of transmutation of possession. There was also the further reason and advantage, viz.: that the lease though operating under the Statute of Uses as a bargain and sale for a term, still did not require enrolment, as the Statute of Enrolments only applied to freehold estates. The disadvantage was that two deeds were requisite, and the lease was frequently lost and incapable of proof, and so the release, as such, in operative.

Object and
effect of
section 2.

The object and effect of the Statute is to give to the conveyance by way of grant, all the advantages with none of the disadvantages above explained attendant on that by way of lease and release (*b*). Being the creature of the Act it is not, of course, a Common Law conveyance as regards an immediate freehold, but it will operate in the same way as regards all uses and powers declared, and should be adopted in every case where the facts do not render other modes of conveyance, as by way of surrender, assignment, release, &c., more appropriate. The word *grant* is the only operative word used in the Act respecting short forms of conveyances, Con. Stat. c. 91, from which, however, it must not be inferred that as an operative word it is to supersede all others; such was not the intention of the Legislature; in fact, the use of the word *grant* in the original Act, 9 Vic. ch. 6, was, as hereafter explained (*c*) in treating of that Act, a singular mistake of the Legislature, which may have led to fatal consequences if uses were declared, for on the passing of that Act lands did not lie in grant. The operative word of conveyance therefore should be such as is appropriate to the facts; thus, if tenant for life in possession conveys to him next in remainder or reversion

(*a*) Watk. Conv. 9th ed. 355.

(*b*) See 12 Vic. c. 71 sec. 2.

(*c*) See post Con. Stat. c. 91, p. 100.

in fee, the operative word should be *surrender*, for in that character the conveyance operates, and should be pleaded as such.

The word grant has a most extensive operation, it may operate as a surrender, lease, release, assignment or other assurance, as the circumstance may require (a). So also conveyances, with other operative words and intended to take effect in other modes, may operate as a grant, or conveyance of another character (b). But it has been held that the mere words "remise, release, and quit claim," will not operate as a grant (c).

The *immediate freehold* only is affected by the Act; by this term is meant the first of the existing estates of freehold: there was no necessity for more extended operation to the Act, as other estates of freehold in remainder or reversion lay in grant at Common Law, as being incorporeal in their nature, whereof no livery could be made.

Questions have sometimes arisen as to the mode in which a conveyance is to take effect, when it could operate either as a Common Law conveyance, or under the Statute of Uses by transmutation of possession, and in ill-framed conveyances since this Act, questions of the same nature may arise. Thus if A, seized in fee, should, for a pecuniary consideration expressed to be paid by B, grant, bargain and sell to B to the use of C; in whom is the legal estate? A question only settled by determining whether the deed operates under this Act as a statutory grant, operating like a Common Law conveyance, or as a bargain and sale, under the Statute of Uses. So again, if A, using the operative word grant only, has conveyed to B, to the use of or in trust for C, on a pecuniary consideration expressed, and the intention were manifest that B should have the legal, and C only the equitable estate, would the deed to carry out such

Operation of the word grant: a grant may operate as a conveyance of different nature. Other operative words may take effect as a grant, &c.

Immediate freehold only referred to.

Where the words grant, bargain and sell, are the operative words, does the conveyance operate as a grant, or as a bargain and sale?

(a) Co. Litt. 301 b; Davidson Conv. vol. 1, 3rd ed. p. 69.

(b) Cameron v. Gunn, 25 Q. B. U. C. 77; Acre v. Livingstone, 26 Q. B. U. C. 282.

(c) Acre v. Livingstone, supra, Hagarty J. *diss.*; see remarks on Con. Stat. c. 91, post, p. 100.

intention be construed to operate as a bargain and sale on the principles above referred to (a)? It would seem that, in the first case put certainly, and in the second case probably, the intention as collected from the whole deed would govern; if no intention were apparent the grantee might elect (b). In some cases it is said that where a deed may operate at Common Law, or by way of use, it shall operate under the former mode, unless the grantee otherwise elect for his benefit (c); but in applying this principle it must be borne in mind that a conveyance operating under this Act is not of course a Common Law conveyance, though it operates as such in regard to the uses declared by it.

SECTION 3.

Feoffments,
unless by deed
to be void.

3. A feoffment, otherwise than by deed, shall be void at law, and no feoffment shall have any tortious operation. 14, 15 V. c. 7, s. 3.

Feoffments.

As mentioned under the last section, a mere oral gift was sufficient to convey a freehold at Common Law, but livery of seisin was requisite; a charter usually accompanied the feoffment as evidence of the transaction, and was therefore worded in the past as well as the present tense; a form which is uselessly (except in deeds of disclaimer) sometimes continued in conveyances at the present day. By the Statute of Frauds a writing and signature were enjoined, and now sealing is requisite: it would seem, however, that it is open to contention that the sealing and delivery by the party creating the estate will supersede the necessity of his signature, notwithstanding the Statute of Frauds, and this not only as to feoffments but as to other assurances (d).

Effect of.

A feoffment was an assurance of greater power than any

(a) Ante p. 51.

(b) Shelford Statutes, 729, note v, 7 ed. and cases there cited; Smith Rl. Prop. 3 ed. 866; 1 Hayes Conv. 5 ed. 162; Roe v. Tranmarr, 2 Smith, Lg. Ca. 5 ed. 450; Haigh v. Jagger, 16 M. & W. 526.

(c) Haigh v. Jagger, 16 M. & W. 541; Heyward's case, 2 Rep. 35 b; Miller v. Green, 8 Bing. 92.

(d) Cherry v. Heming, 4 Ex. 631; Aveline v. Whisson, 4 M. & G. 805; Tapper v. Foulkes, 9 C. B. N. S. 797, *arguendo*; see further post, pp. 60, 61.

other (a). By it, contingent remainders depending on particular estates could be barred or destroyed (b); it destroyed powers appendant or in gross; if made by tenant in tail in possession, for a fee simple absolute, it worked a *discontinuance*, which tolled or took away the right of entry of the issue in tail, as also of the remainder-man or reversioner, and left but a right of action, to be enforced by the peculiar writ of formedon (c); when made by a person in actual possession, though wrongfully so, yet if not a mere temporary trespasser, it had the effect of passing by *wrong* the estate of which feoffment was made; thus, on a feoffment in fee by a disseisor or mere tenant at will, the feoffee took a fee *by wrong*, the true owner of the freehold was *disseised*, remainders and reversion, if any, were *divested* or *displaced*, so that each (strictly speaking) ceased to have any *estate*, which was turned to a right to be enforced on proper occasion (d). The consequence of any such tortious conveyance (other than by tenant in tail) was immediate forfeiture of the feoffor's estate (e). As by the Act a feoffment has no longer a tortious operation, so now it will work no forfeiture (f).

Tenant for a less estate might convey a fee by wrong,

but such worked a forfeiture.

SECTION 4.

4. A partition and an exchange of any land, and a lease required by law to be in writing of any land, and an assignment of a chattel interest in any land, and a surrender in writing of any land, not being an interest which might by law have been created without writing, shall be void at law, unless made by deed. 14, 15 V. c. 7, s. 4.

Parceners, inasmuch as the estate in co-parcenary was cast on them by act of law, were at Common Law compellable to make partition, and might have done so by

(a) See Smith's Real Prop. 3 ed. 651. (b) Archer's case, 1 Rep. 66 b.

(c) Co. Litt. 327. A discontinuance no longer tolls a right of entry, Con. St. ch. 27, sec. 80, and the writ of formedon is abolished with real actions.

(d) 1 Bl. Com. by Stephen, 519; Co. Litt. 327; Smith Real Prop. 3 ed. 651.

(e) 2 Bl. Com. 274. (f) Shelford Sts. 7 ed. p. 624, note k.

- Partition— how enforced at common law and under early statutes, in equity, 32 Vic. c. 33. Con. St. c. 82. How made at common law. Effect of deed of partition.
- parol (a); tenants in common and joint tenants were also compellable by 31 H. 8, c. 1, & 32 H. 8, c. 32 (b). The partition was enforced by writ of partition, proceedings on which were regulated by 8 & 9 Wm. 3, ch. 31: this writ is now abolished (c) and other modes of partition substituted. The right of partition also existed, and might have been enforced, in equity (d); so may it yet; in fact, as regards equitable fees simple, the Court of Chancery has exclusive jurisdiction (e). The power of a Court of Equity to make partition in cases of legal estates was placed by Lord Eldon on the ground of extreme difficulty attending process of partition at law; this was complained of as trenching on the writ of partition, as an usurpation of authority, and as wresting from the Courts of Common Law their ancient exclusive jurisdiction (f). Partition is now compellable by the Act of 32 Vic., and regulated by that Statute and Con. Stat. c. 82. secs 46, 47, 48, 49, under which also by directions to sell, the difficulties which arose formerly from impartible nature of the property can be overcome. Parceners being compellable at Common Law to make partition, might have done so, as to things lying in livery or grant, without deed, so also might tenants in common as to things lying in livery (g); but joint tenants of freeholds, corporeal or incorporeal, and tenants in common of incorporeal hereditaments where no livery was had, could not have made partition without deed, by reason of the Statutes (h).
- Prior to this Act the Statute of Frauds enjoined writing; and all *voluntary* partitions are required to be by deed, by the Act of 32 Vic.
- As between parceners, the effect of a deed of partition was less than a grant. It did not operate by a new inves-

(a) 2 Bl. Com. 189; Watkins Conv. 9 ed. 153, note.

(b) 2 Bl. Com. 185, 194. (c) Con. Stat. c. 27, sec. 78.

(d) Agar v. Fairfax, 17 Ves. 533; 2 W. & T. Lg. Ca. 2 ed. 374.

(e) 32 Vic. c. 33, ss. 38, 43, 44.

(f) Note by Hargrave to Co. Litt. 169 a.

(g) Litt. s. 250; Co. Litt. 169 a. (h) Co. Litt. 169 a.

titute of the seisin, as parceners had already the entire seisin by descent; it simply dissevered the unity of possession, and made no degree in the title: thus land derived *ex parte maternâ* would still partake of the quality of a maternal estate for purposes of descent.

It may be questionable whether an estate can now descend in co-parcenary, as Con. Stat. ch. 82, s. 38 directs that when an inheritance descends, the heirs shall take as tenants in common. Can an estate in co-parcenary now arise?

As between parceners also there was a condition implied in law that if either were evicted after partition, she might re-enter on the other shares and avoid the partition; if however she had aliened her whole estate, neither she nor her alienee had any right of re-entry (*a*). Such condition did not exist between joint tenants and tenants in common. The reason is said to be that as at Common Law parceners were compellable to make partition, that law took care that they should not be prejudiced thereby (*b*). Whatever may be the effect of the Act of 32 Vic., as to right of re-entry in cases governed by it (see sec. 24), and subject also to the question above alluded to, as to whether estates can now descend in co-parcenary, it would seem that at least on a voluntary partition of an existing estate in co-parcenary, a condition of re-entry, as at Common Law, will still be implied, and section 10 of this Act does not restrain such result. The Imperial Act expressly enacts that a partition shall not imply a condition of re-entry. On partition, warranty implied on eviction.

An exchange (*c*) is a mutual grant of equal interests, the one in consideration of the other, as a fee for a fee, an estate for life for an estate for life, perfect only on actual entry. Exchange.

The word exchange is the only operative word, and is The word

(a) Smith Rl. Prop. 684, 3rd ed., referring to 2 Cruise Te. 19, s. 30; Burton, 319; Co. Litt. 173 b.

(b) Smith Rl. Prop. 3rd ed. 685.

(c) See further, Smith Rl. Prop. 3rd ed. 676; Watkins, 9th ed. 237; 2 Bl. Com. 322.

exchange indispensable to this mode of conveyance (a): thus, in
indispensable. dower, a plea that the husband of demandant exchanged lands for those in question, and that demandant elected to take dower out of the other lands, was held not proven by an ordinary deed of bargain and sale from the husband for a consideration therein expressed of £600 (b).

An exchange at Common Law could only be between *two parties*, but the number of persons composing each party was immaterial; the reason was that the implied warranty of title could not be carried out if there were more parties than two (c).

Implied war- On every exchange there was an implied warranty of
ranty of title. title, if the word *exchange* were used; so that on the actual eviction of either party or his heirs, the party evicted could re-enter on the land given in exchange, and avoid the exchange in whole or *pro tanto*: but this did not extend to alienees (d). By section 10 of this Act the implied warranty is abolished.

When requir- At Common Law if the estates conveyed lay only in
ed to be by deed, &c. grant, or if the properties were in several counties, the exchange had to be by deed. By the Statute of Frauds writing was enjoined, and now a deed is requisite.

Leases, At Common Law a lease for life required to be created
by livery, but a lease for a less estate might be by parol.
at Common Till entry, on a lease operating at Common Law and not
Law. under the Statute of Uses, the lessee has but an *interesse termini*, and can bring no action of trespass, and receive no release of the reversion.

Statute of The first four sections of the Statute of Frauds are as
Frauds. follows:

Sec. 1. All leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery of seisin only, or by parol, and not put in writing and

(a) Watk. 9 ed. 329; Co. Litt. 50 b., note (1) by Harg.; Towsley v. Smith, 12 Q. B. U. C. 555.

(b) Towsley v. Smith, *supra*; Stafford v. Trueman, 7 U. C. C. P. 41

(c) Co. Litt. 50b, note 1; 51a, note 1. (d) Smith Rl. Prop. 676.

signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage to the contrary, notwithstanding.

Sec. 2. Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term, shall amount unto two-third parts, at least, of the full improved value of the thing demised.

Sec. 3. And moreover, that no leases, estates or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed, or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law.

Sec. 4. No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

The 1st section appears to relate to cases where an estate or interest is created *de novo*, and actually passes to the lessee or grantee; the 3rd section to cases where an estate or interest previously existing is transferred; and the 4th section to cases where a right of action only is created by an agreement, or where an agreement is made respect-

The bearing of the first four sections of Statute of Frauds.

ing the future creation or transfer of an estate or interest (a). The 4th section also must be read as though the words *agreement on* were interlined before the word *sale*, though there are cases to the contrary (b). To this section also the exception created by section 2 from the effect of section 1, does not apply; consequently an agreement by parol for a lease for any short period, though within section 2, cannot be enforced (c). So also such exception does not apply to section 3, and therefore all existing estates and interests, for however short a period or however uncertain, must be assigned or surrendered in writing unless by act of law; and if such estate or interest were such as under section 1 required to be created by writing, then by this Con. Stat. the assignment or surrender, unless by act of law, must be by deed (d).

Whether an instrument is a present demise or only an agreement

There is frequently great difficulty in determining whether an instrument is intended to operate, and does operate, as a present demise, or merely as an agreement, and *vice versa* (e); in fact some care is requisite in framing an agreement for a lease not requisite to be in writing, to prevent its operating as an actual lease; to add to the difficulty, cases varied as to whether or not this Act makes any difference in regard to the question; the later cases favor the construing as an agreement an instrument which as a lease would be void (f). In one case (g), Bramwell, B., said: "It seems to me that in *Stratton v. Pettit* (16 C. B. 420), the Court made this mistake. Whereas before the Stat. 8 and 9 Vic., c. 106 passed, it involved no inconvenience that certain words should be interpreted as an actual de-

(a) Smith Rl. Prop. 3 ed. 300. (b) Sug. Vend. 13 ed. 98; 14 ed. 123. (c) *Ib.*

(d) *Hogan v. Berry*, 24 Q. B. U. C. 346; which would seem to have been a case of an *uncertain* interest.

(e) Shelf. Rl. Prop. Sts. 7 ed. 620, and cases there cited; Addison Contracts, 316, 5 ed.

(f) *Rollason v. Leon*, 7 H. & N. 77; *Hayne v. Cummings*, 16 C. B. N. S. 421; see also *Tidey v. Mollett*, 16 C. B. N. S. 298, and *Stranks v. St. John*, L. R. 2 C. P. 376, per Willes, J.; *semble*, *Stratton v. Pettit* overruled.

(g) *Rollason v. Leon*, 7 H. & N. 77.

mise (an instrument void as a lease for want of signature being also void as an agreement.—*Ed.*); yet when that Statute passed and made the same reasoning inapplicable, and rendered it impossible that parties using words of agreement should have intended to create a lease, the Court still held the same reasoning applied, and that words of mere agreement were words of lease." The effect of holding an unsealed instrument, which should have been under seal, to be intended as a present demise, and not as an agreement, is that it is void *at law* under this Act, whereas, by construing it as an agreement, it is good as such.

The question as to whether a transaction is a present demise or a mere agreement, will be less frequent since this Act, as an instrument intended as an agreement for a lease exceeding three years, can never take effect as a present lease if not under seal; but still on an instrument relating to an interest not required to be created in writing, the question often arises; as also where the interest is for more or less than three years, and the instrument is by deed; both of which cases, as regards the question, are untouched by this Act. It is conceived that in such cases the decisions on the question under the Statute of Frauds, are still applicable as to the construction, subject however to this, viz, that the Courts will, since this Act, frequently construe that as a mere agreement which, before the Act, would have been construed as intended as an actual demise, on the principles laid down by Bramwell, B., as above.

If a lease is void as such under this Act, yet if the lessee enter and pay rent, with reference to the lease or some yearly holding generally and not merely *de die in diem* as tenant at will, or if with reference to a new fixed period, or under circumstances which negative the idea of a tenancy at will (a), a tenancy from year to year is thereby created (b);

Entry under void lease and payment of rent, may create tenancy from year to year in which the terms of

(a) Per Parke, B., in *Braythwaite v. Hitchcock*, 10 M. & W. 497; *Richardson v. Langridge*, 4 Taun. 128; *Tud. Lg. Ca.* 21, and cases quoted; *Clayton v. Blakey*, 2 Sm. Lg. Ca. 104; *McInnes v. Stinson*, 8 U. C. C. P. 34.

(b) *Ib.*

the void lease will be incorporated. and it would seem that so far as applicable the terms and provisions of the intended lease will govern (a).

Though void at law, specific performance may be had. Though the instrument be void at law as a lease, yet specific performance may be enforced, treating it as an agreement for a lease (b): and even at law, where an instrument not under seal might have operated as an actual demise but for the Statute, which makes it void, yet if it contain an agreement for a grant of a regular lease, such agreement is binding and an action may be maintained (c).

Authority to agent under St. of Frauds, It will be observed that under section 4 which refers to *agreements*, no estate passing, the authority to the agent may be by parol; but under sections 1 and 3, which provide for cases where the estate is intended to be actually created or transferred, the authority must be in writing.

must it now be by deed? The Consolidated Statute having enjoined sealing in all cases under section 1, (unless within section 2), and in all cases of assignments or surrender in deed within section 3, (unless the interests assigned or surrendered might have been created without writing), the question arises whether the authority to the agent must not in such cases also be under seal; it has been laid down in a work of some authority that it must be by deed (d).

If a deed be delivered, is signing requisite under Statute of Frauds? There is much authority that if, where requisite, a deed be delivered, the Statute of Frauds need not be complied with as to signature (e). At Common Law signature was not requisite, even in cases where sealing was (f); and as explained in treating of section 2, up to the time of the Statute of Frauds estates in possession could be created or

(a) *Smith Ld. and Tenant*, note p. 79; *Richardson v. Langridge*, Tud. Lg. Ca. 21, in notes, cases cited; *Thomas v. Packer*, 1 H. & N. 669; *Pistor v. Cater*, 9 M. & W. 315; *Tress v. Savage*, 4 E. & B. 36; *Lee v. Smith*, 9 Ex. 663.

(b) *Parker v. Taswell*, 2 DeG. & J. 559.

(c) *Bond v. Rosling*, 30 L. J. N. S. Q. B. 227; 1 B. & S. 371.

(d) *Addison Contracts*, 4th ed. 46.

(e) *Aveline v. Whisson*, 4 M. & G. 801; *Cherry v. Heming*, 4 Ex. 631; *Addison Contracts*, 4th ed. 4; *Prest. Shepp. Touch.*, 56; *Tupper v. Foulkes*, 9 C. B. N. S. 797, *arguendo*.

(f) *Black. Com.* vol. 2, 305.

transferred without deed or writing of any kind. To remedy this, the Statute of Frauds was passed, but as remarked by Rolph, B. (a), "The object of the Statute was to prevent matters of importance from resting on the frail testimony of memory alone, it was not intended to touch those instruments which were already authenticated by a ceremony of a higher nature than a signature or mark." This construction does no violence to the language of the Statute: thus, a lease for years, or a freehold estate created by deed without signature is not "made or created by livery of seisin only, or by parol" in the language of section 1: and as to the transfer of existing estates under section 3, the word *signed* may be referred to the words *note in writing* only.

It would seem that to the validity of a deed not only is no *attesting* witness necessary, but no person need have been present to witness the delivery: thus, in covenant in an indenture said to have been between defendants and plaintiff, it appeared that all parties had executed except the defendant Heming, and the deed was produced out of his custody. There was, however, a seal affixed for each party, and the defendant had written to the plaintiff, referring particularly to the indenture, and describing it as made by the various parties, including himself; this was held sufficient evidence to go to the jury of sealing and delivery by him (b). There is also a class of cases where no evidence is capable of being given of execution of a deed by a party to a suit, except by calling him as a witness, and where the attesting witness cannot be called as being a party to the record: thus, in one case the defendant in dower had witnessed the execution by demandant, as a markswoman, of a conveyance to one from whom the defendant *afterwards* purchased; the conveyance contained a release of dower; it was considered that proof of the defendant's signature as a witness was inadmissible (c).

Attestation
and witness-
ing not essen-
tial to a deed.

(a) *Cherry v. Heming*, 4 Ex. 631

(b) *Cherry v. Heming*, 4 Ex. 631; see also *Clark v. Stevenson*, *infra*, and C. L. P. Act, section 212.

(c) *Clark v. Stevenson*, 23 Q. B. U. C. 525, *Hagarty, J., diss.*

One seal may suffice for two parties.

Where one of two partners signed in the name of both in presence of the other, and for him and with his assent, though there was but one seal, it was held the deed of both; the deed, however, did not relate to lands, but apparently to a matter of partnership business (a).

Assignment,

An assignment is properly a transfer of one's *whole* interest in *any* estate (b); but it is usually applied to an estate for years, or equitable interests.

of whole estate in a term has been construed as a lease.

A transfer of the whole interest in a term, has been construed as a lease, and not as an assignment, rent having been reserved to the assignor, the intention having been to create the relation of landlord and tenant, and the transaction being valid, if regarded as a lease, but void if regarded as an assignment, as not being in writing (c). Lord Denman, C. J., observed "If we were to decide that the transaction was an assignment, we should at the same time decide that it was no assignment, being by parol only, and we should construe that which was expressed to be a lease, to be an assignment only *ut res pereat*, which is against a known salutary maxim."

As an assignment operates on the *whole* interest, it is said it cannot be made of a term to take effect *in futuro* (d).

All assignments must be in writing, and if of interests that could not be created without writing, then by deed, Authority to agent be by deed, if the assignment be by deed.

The necessity, by reason of section 3 of Statute of Frauds, of all assignments being in writing and signed by the assignor or his agents, or by deed, was before explained (e); as also the necessity of a *deed* in all cases where the interest assigned is such as could not be created without writing (f); and also the question as to whether if the assignment must be by deed, this Act does not superadd the necessity of a seal to the authority to an agent transferring, which by the Statute of Frauds, need only be in writing (g).

(a) *Moore v. Boyd*, 15 C. P. U. C. 513; see also *Ball v. Dunsterville*, 4 T. R. 313.

(b) *Watk. Conv.* 9th ed. 343; *Watt v. Feader*, 12 C. P. U. C. 254.

(c) *Pollock v. Stacy*, 9 Q. B. 1035; see also *Cottee v. Richardson*, 7 Ex. 143; but see *Barrett v. Rolph*, 14 M. & W. 348, *contra*.

(d) *Watk. Conv.* 9th ed. 343 note; *Smith Rl. Prop.* 3rd ed. 710.

(e) p. 58.

(f) p. 58.

(g) p. 60.

As before explained also, no signature may be required if the assignment be by deed.

A *surrender* (a) is the yielding up or returning of a smaller estate, to him who has a greater estate in remainder or reversion *immediately expectant* on such smaller estate.

Surrenders are of two kinds, express or in deed, and implied or in law.

At Common Law, (except as to things which lay only in grant, such as incorporeal hereditaments), a surrender was good by parol, and though of a freehold estate, might have been without livery of seisin, by reason of the privity of estate necessarily existing between the parties.

The necessity, by reason of the Statute of Frauds, of all surrenders (except those by operation of law) being by deed or note in writing was before explained (p. 58); as also the necessity of a *deed*, by reason of this Act, in all cases where the interest surrendered is such as could not have been created without writing (p. 58); and also the question as to whether, when this Act requires the surrender to be by deed, it does not practically superadd to the Statute of Frauds the necessity of the authority to an agent executing the surrender, being also by deed (p. 60).

No surrender of an estate, either in deed or in law, takes place by mere cancellation or destruction of the instrument creating the estate (b); but it is a circumstance which, with others, will aid the *implication* of a surrender (c).

Surrenders in law are expressly excepted from the Statute of Frauds, and are not within this Act, which speaks of surrenders in writing (d); they are sometimes of a nature to give rise to questions of great difficulty. These

All surrenders except by act of law must be in writing.

If of an interest that required to be created in writing, then must be by deed.

Authority to the agent must be by deed, if the surrender is by deed.

Surrenders in law.

(a) As to surrenders, see Smith Rl. Prop. 3 ed. 700; Watk. Conv. 9 ed. 339; 2 Black. 326; 2 Smith, Lg. Ca. 5 ed. 713; 6 ed. 759.

(b) Lord Ward v. Lumley, 5 H. & N. 87; see also Fraser v. Fralick, 21 Q. B. U. C. 346; Fraser v. Fraser, 14 C. P. U. C. 70; Laur v. White, 18 C. P. U. C. 99.

(c) Doe d. Burr v. Denison, 8 Q. B. U. C. 185.

(d) Lewis v. Brooks, 8 Q. B. U. C. 576.

surrenders have been referred to the doctrine of estoppel *in pais* (a). The term surrender by operation of law was said by Parke, B. (b), to be properly applied to cases where some "act has been done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says that the act itself amounts to a surrender. In such case, it will be observed, there can be no question of intention. The surrender is not the result of intention; it takes place independently, and even in spite of intention."

Acceptance
of new lease.

Parol agree-
ment and
change of
possession.

Defence to
subsequent
rent,

not prior
rent,
except by
way of equi-
table defence.

The acceptance of a new lease, though for a less period than the existing term, is a surrender of the term, provided such an estate pass by the new lease as was contemplated by the parties at the time (c). So also a parol agreement between landlord and tenant, that the tenancy should cease and the landlord re-enter, acted on by re-entry and the tenant quitting, is a good surrender in law (d); but there must be change of possession (e); though even without such change, and irrespective of validity of surrender, the agreement acted on by the tenant might operate as a defence to an action for subsequent rent (f). Rent due prior to a surrender is not thereby discharged (g); but acceptance of a promissory note, and a surrender by way of new contract and in part performance, was held good by way of *equitable* defence to a bond to the plaintiff securing payment of rent of the premises surrendered, overdue at the time, though

(a) Doe v. Oliver, 2 Sm. Lg. Ca. 5 ed. 713; Doe d. Burr v. Denison, 8 Q. B. U. C. 185.

(b) Lyon v. Reed, 13 M. & W. 285.

(c) Doe d. Biddulph v. Poole, 11 Q. B. 713; Roe v. Archbishop of York, 6 East, 86.

(d) Grimman v. Legge, 8 B. & C. 324; Dodd v. Acklom, 7 Sc. N. R. 415; but see Morrison v. Chadwick, 7 C. B. 266.

(e) Johnstone v. Huddleston, 4 B. & C. 922; Mollett v. Brayne, 2 Camp. 103; Carpenter v. Hall, 16 C. P. U. C. 90.

(f) Gore v. Wright, 8 A. & E. 118.

(g) Attorney General v. Cox, 3 H. L. C. 240; Bradfield v. Hopkins, 16 C. P. U. C. 298.

such acceptance would have been no valid defence at law for the overdue rent (a).

SECTION 5.

A contingent, an executory, and a future interest, and a possibility coupled with an interest in any land, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent into or upon any land, may be disposed of by deed, but no such disposition shall by force only of this Act, defeat or enlarge an estate tail, and any such disposition by a married woman shall be made conformably to the provisions of the Act enabling married women to convey their real estate. 14, 15 V. c. 7, s. 5.

Contingent interests may be disposed of by deed.

SECTION 11.

Any estate, right, title or interest in lands which, under the fifth section of this Act, may be conveyed or assigned by any party, shall be bound by the judgments of any Court of Record, and shall be liable to seizure and sale under execution against such party, in like manner and on like conditions as lands are by law bound by judgments and liable to seizure and sale under execution, and the Sheriff selling the same, may convey and assign the same to the purchaser in the same manner and with the same effect as the party might himself have done. 12 V. c. 71, s. 13—14, 15 V. c. 7, s. 9.

Any interest in lands which might be conveyed under this Act to be liable under executions.

Section 11 requires no remarks beyond those applying to section 5, and those made in reference to execution (b), except that by 24 Vic. ch. 41, sec. 8, section 11 of the Con. Stat. was repealed and re-enacted. The change made is that part of the Con. Stat. which enacts that lands be bound by judgment is by the later Act to be omitted. 24 Vic. c. 41, s. 8.

The Stat. 12 Vic. ch. 71 sec. 5, was in substance much the same as sec. 5 of 14 & 15 Vic. ch. 7, which repealed it; the former, however, applied only to rights of entry for condition broken, whilst the latter applies to rights of entry,

(a) *Bradfield v. Hopkins*, supra; see *Webb v. Hewitt*, 3 K. & J. 438.

(b) *Post*, title Execution.

an important difference as hereafter explained : the former Statute also applied to personal property, whilst the latter does not.

Con. St. c. 90, s. 5, as to contingent interests, &c., The Statute 14 and 15 Vic., Con. Stat. ch. 90, sec. 5, is taken from the Imp. Stat. 8 & 9 Vic. ch. 106. Both the Imperial Act and the Provincial Act of 14 & 15 Vic. were designedly retrospective in their operation, that is, contingent interests created and existing before the passing of those Acts were made assignable, but, as hereafter explained, the Con. Stat. by sec. 12 varies this (a).

does not apply to mere possibilities, rights of action, rights of entry for condition broken, chattels or devises.

As many titles depend on the question of the validity (or rather the invalidity), of conveyances of contingent interests and rights of entry before the Statute, it may be advisable to define shortly their nature, how they stood at Common Law, and the further statutory enactments as regards their devisable quality, especially as the Act does not apply to *mere naked* possibilities, or to mere rights of *action* as distinguished from rights of entry, or to rights of entry *for conditions broken*, or to *chattels* not being chattels real, or to devises.

Distinctions between the various interests.

The distinctions between contingent, executory and future interests, and possibilities coupled with an interest, are sometimes exceedingly refined and subtle (b) : it was said by Lord Ellenborough that it is far easier to instance what they are not, than to define what they are (c). As they are now all capable of being conveyed under the Statute, it is not proposed to point out all the distinctions between them. It may be mentioned, however, that all contingent interests are necessarily executory and future, but all executory or future interests are not necessarily contingent, but may be vested in point of estate, or, says Mr. Preston (d), neither vested nor contingent.

Interests executory and future may be contingent, or vested, or neither.

(a) See remarks as to sec. 12, pp. 85, 86.

(b) 1 Prest. Est.; Fearn's Cont. Remrs. by Butler and app. thereto on Executory Interests, by Smith; notes to Hanson v. Graham, Tud. Lg. Cases.

(c) Doe v. Tomkinson, 2 M. & S. 170.

(d) 1 Prest. Est. p. 63; Titles, 2 ed. p. 118.

An executory or future interest, neither vested or contingent, may arise by executory devise, or on a springing or shifting use, dependent on no contingent or uncertain event, but on one that certainly must happen, as on a limitation to B and his heirs to the use of C and his heirs on the death of A, &c. The interest is not contingent, because it does not depend on a *contingency*, as would be the case if the event named were the return of A from Rome, which possibly never might occur: on the other hand the interest is not *vested*, for it is not *present*, so as to be assignable at Common Law (a).

When future and executory interests are neither vested nor contingent.

An interest may be executory and future as regards *time of enjoyment and of possession*, and yet vested in point of estate (b). Of this an instance is afforded by a vested remainder in B dependent on a life estate in A.

When vested.

The Statute relates not to these latter interests, which are presently executed and vested as regards *estate*, dependent on no contingency, and merely executory as regards *time of enjoyment*; for such were alienable at Common Law. It relates to interests executory and future in all respects, not only as to time of enjoyment, but also of vesting in estate, which time may be fixed and certain, or contingent and uncertain: and in this sense only they are spoken of hereafter.

To what future interests the act relates.

Strictly speaking there cannot be a contingent *estate*; there may be a contingent *interest*; but no interest except such as is vested, is accurately termed an estate (c).

Possibilities are interests at the same time executory, future and contingent.

Possibilities.

As a mere naked possibility stands yet, as at Common Law, unassignable *at law* at least, it is requisite to point out the distinction between such a possibility, and that affected by the Statute, viz., a possibility coupled with an

(a) See last note; also Jones on Uses, pp. 60, 67.

(b) See as to the vesting of estates under Wills, Jarman on Wills, and notes to Hanson v. Graham, Tud. Lg. Cases.

(c) Prest. Abs. 2 ed. p. 92.

interest, of which the object may or may not be ascertained.

It is not easy sometimes to define the various classes of possibilities, especially as some writers class those coupled with an interest where the object is not ascertained, under the head of *mere* possibilities; or deny that the possibility is coupled with an interest when the object is not ascertained, as is the case of a devise to the survivor of two living persons.

Mere naked
possibilities
—instances.

Of *mere* or *naked possibilities*, not coupled with any interest, instances are afforded by the expectancy of an heir-at-law to succeed to the estate of his ancestor; of a person to take under the will of another then living, or under a power of appointment that may or may not be exercised in his favor (a).

Coupled with
an interest
whose object
not fixed—
instances.

Possibilities coupled with an interest where the object is not fixed or ascertained, may, for the *purposes of the Statute* at least, be illustrated by the cases of gifts to take effect in favor of the survivor of several persons; to children who shall attain twenty-one; to children who may be living on the death of their surviving parent, or the like contingency. These possibilities have been said not to be contingent interests (b), or coupled with an interest, but to be mere possibilities (c); and if this be so, then the instances above put are not within the Statute, and such interests not assignable at law. It is ventured to submit, however, that such cases are within the Act, and for the purposes of the Act at least, to be considered as beyond mere possibilities. As regards the existence of a possibility coupled with an interest when the object is not ascertained, Mr. Preston says, "a contingent interest gives a mere possibility; a possibility which is coupled with an interest when the person is fixed: mere possibilities to persons not

(a) 2 White & Tu. Lg. Ca. Eq. 2nd ed. p. 652; Shelford Stat. 7th ed. 345.

(b) Per Lord Ellenborough, C. J., Doe v. Tomkinson, 2 M. & S. 170.

(c) Preston Estates, vol. 1, pp. 75, 76; see also Watkins Conv. 9th ed. title Possibility, note.

ascertained, as to the survivor of several—are not coupled with an interest.” At the the time he wrote, this definition answered every purpose; but since then the Act has alluded in express terms to a possibility where the object is not ascertained, and yet coupled with an interest, a new species of possibility not contemplated by Mr. Preston, or rather denied by him as capable of existing, and classed as a mere possibility.

Mere naked possibilities, as above defined, not coupled with any interest, would alone appear to be excluded from the Act (a); and it is apprehended that though before the Act a devise to the survivor of two living persons might be termed a possibility not coupled with interest, yet it is not so now for the purposes of the Act. It would be difficult to suggest any cases answering the language of the Act, of possibilities coupled with an interest where the object is not fixed, if the above instances do not.

Possibilities coupled with an interest where the *object* is fixed, but the *event* is uncertain whereupon such object is to take, may be exemplified by many cases of contingent remainders, or limitations by way of executory devise, or springing or shifting use, in favor of ascertained persons, the which, however, are not to take effect or become vested estates till the happening of some named event, which by possibility never may happen (b); as on a limitation by executory devise or shifting use to A, and on the return of B from Rome, then to the use of C.

The inchoate right to dower of a woman whose husband is alive is a possibility which is within the Act (c); and may be sued for in the name of the assignee (post, Dower):

(a) 2 White and Tud. Lg. Ca. Eq. 2nd ed. 654; 3rd ed. 708.

(b) See Watkins Con., title Possibility, note.

(c) Miller v. Wiley, 16 C. P. U. C. 529; 17 C. P. U. C. 368, s. c. In this case, unfortunately, the case of McAnnany v. Turnbull, 10 Grant, 298, was not referred to; it is distinguishable from that case in this, that in the latter case the husband was dead at the time of the assignment of the dower, whilst in the former he was not. In some respects Miller v. Wiley upholds the case in equity, for the Court said “it may therefore be that a demand for dower, which has been transferred *after her husband's death*, though brought in the name of the woman, *as it*

Husband's
interest in
lands of the
wife.

whilst on the other hand if the husband were dead, so that the element of contingency is removed as regards the right in point of interest, and the interest becomes vested, giving a present certain right of action, the case is not within the Act (a), and the assignment is recognized only in equity (b).

At Common Law the husband, before birth of issue, can convey only for the joint lives of himself and his wife, and could not convey his possibility of becoming tenant by the curtesy, but after birth of issue capable of inheriting and on seisin of the wife, he could convey for his own life his inchoate right as tenant by the curtesy initiate (c); and such right as regards alienation needs not the aid of this Act, and is

probably must be, is brought for the benefit of the assignee." Now this recognizes that such a transfer is not within the Act, for if it were, then the action must be brought, not in the name of the woman, but of her assignee, see post p. 76.

On the other hand, the case at law conflicts with that in equity in this, that the Court stated (p. 542) "since the Con. Stat. ch. 90, we are inclined to think that a woman may before assignment of dower convey her claim to it to any person, for it is an interest, though not an estate in land, and so we think within the Statute." Now considering that the Court, just prior to the above words, was referring to the case of a *widow's* conveying, it would seem that by those words they also referred to the same case, and intimated that a *widow* may convey by force of the Act, which conflicts with the prior decision in equity. It is manifest that the Court was in those words referring to the case of a widow, for supposition to the contrary would conflict with what is subsequently laid down (p. 543), where the Court, after referring to the fact that it was a case of release to a purchaser *in the husband's life time*, said "if it turn out that the alleged purchaser was a mere assignee of her inchoate right of dower, she will succeed, because the assignee will not have been a purchaser, but a mere stranger to the land, *and as such a right would not pass*, she may well say she did not in law release her dower, as alleged." It is submitted that the assignee of a *married woman* of her inchoate right might take by force of the Act, by an assignment executed with the proper formalities, and that the right would pass by assignment; that such inchoate right is at least a possibility coupled with an interest within the Act, and that if the right does pass, the assignee can sue in his own name (post p. 76): also that the case of an assignment by a *widow* is not within the Act; and though valid as a mere contract in equity, is not valid at law to pass any interest, and the assignee cannot sue in his own name. It is to be remarked that in *Miller v. Wiley*, the Court stated, (p. 534) "it is not necessary to express any opinion on this question."

(a) *McAnnany v. Turnbull*, 10 Grant, 298; see, however, the observations in the previous note.

(b) *Rose v. Simmerman*, 3 Grant, 598; post p. 257.

(c) *Smith Rl. Prop.* 3 ed. 186; *Moffatt v. Grover*, 4 C. P. U. C. 402; *Watk. Conv.* 3 ed., by Preston, p. 54; see further as to the husband's rights, the remarks on Con. Stat. ch. 73.

not within it (a). Before seisin, as in case the wife's estate should be in remainder dependent on a life-estate (in which case the seisin of the freehold is in the life tenant), as also before birth of issue, the husband, so far as relates to his interest as tenant by the curtesy, as distinct from his marital right to the pernaney of the profits during the joint lives of himself and wife, has a contingent interest, which it is submitted is within this Act, and therefore alienable by his conveyance, or on execution against him (b), unless in the latter case it is controlled by Con. Stat. ch. 73, sec. 13 (c). Such interest would seem to stand as regards its alienable qualities by force of this Act on at least as high a footing as a wife's inchoate right to dower during the life of her husband, which is within the Act (d).

Possibilities coupled with an interest whereon the contingency exists in the event, and not in the object, are in fact contingent and executory interests, and governed by the same rules in respect of their alienable and other qualities as hereafter mentioned in regard to contingent interests. When, however, the object is not fixed, as in the instances above given, they were wanting in the qualities of such interests, in that they could not even be released, (e) or devised under the Statutes of Wills of Henry (f), and it may be doubtful whether they are now devisable.

Bare possibilities as above defined are not within the Act, and stand yet on the same footing as those coupled with an interest where the object was not fixed occupied before the Act. Though incapable of being aliened at law, an assignment *for value* is enforceable in equity (g).

(a) See *Emrick v. Sullivan*, 25 Q. B. U. C. 107, per Draper, C. J.

(b) See *Moffatt v. Grover*, 4 C. P. U. C. 402, per McLean, J., that after birth of issue the husband's interest as tenant by the curtesy initiate could be sold at Common Law.

(c) See observations on that Act.

(d) Ante, p. 69.

(e) *Smith Rl. Prop.* 3 ed. 692.

(f) *Smith Rl. Prop.* 3 ed. 951; *Doe v. Tomkinson*, 2 Mau. & S. 165; see the principle discussed, 1 Jar. Wills, 2 ed. 37.

(g) *Lyde v. Mynn*, 1 My. & Keen, 683; *Pope v. Whitcombe*, 3 Russ. 124; *Wethered v. Wethered*, 2 Sim. 183; see *Harwood v. Tooke*, 2 Sim. 192; *Alexander v. Wellington*, 2 Russ. & M. 55; *Carleton v. Leighton*, 3 Mer. 667; see also 2 W. & T. Lg. Ca. 2 ed., 654, 610.

Possibilities with an interest dependent on uncertainty of event only, devisable, &c.

If the object were unascertained, not releasable or devisable,

And the same as to bare possibilities.

Rights of
entry,

distinguished
from rights of
action.

Rights of en-
try distin-
guished from
rights of en-
try for condi-
tion broken.
What rights
of entry are
within the act

Rights for
condition
broken.

The interests which have been alluded to confer manifestly no immediate *right of entry*, and this right is to be distinguished from a mere right of action, which is not within the Act. A right of entry confers a right of action, but a right of action to recover lands does not necessarily confer a right of entry. A right of entry exists in all cases of abatement, intrusion, or disseisin (*a*), and simultaneously with that a right of action; formerly the right of entry might have been tolled by descent cast, discontinuance, or warranty, in which case a right of action alone was left: so also in cases of deforcements (*b*), (not comprising cases of abatement, intrusion or disseisin, and the case of overholding tenants,) no right of entry, but a mere right of action exists. The claim for dower withheld is a familiar instance of the existence of a right of action without a right of entry; so also the right to avoid a conveyance on equitable grounds.

Rights of entry are further to be subdivided for the purposes at least of this Statute, into rights of entry for condition broken, which alone were included in the former act of 12 Vic. c. 71, and are not expressly referred to nor seem to be within this Act, which, it is said (*c*), relates to rights of entry as on "a disseisin, or where a party has a right to recover lands, and his right of entry, and nothing but that remains."

Rights of entry for condition broken were never favored in law, which has always leaned strongly against forfeitures, and moreover, in the most frequent instances wherein they occur, viz., on leases, the Stat. 32, H. 8, c. 34, has afforded a remedy to assignees, for breach during their estate, and enables them to take by assignment right to enter for future breaches of covenants tending to the maintenance of the reversionary estate, or as to rent (*d*), but it gives no present right to enter for breaches prior to the assignment.

(*a*) Black. Com. vol. 3, p. 168; by Leith, p. 197. (*b*) See note *a* *supra*.

(*c*) Hunt v. Bishop, 8 Ex. 675; Hunt v. Remnant, 9 Ex. 635; see also Bennett v. Herring, 3 C. B. N. S. 370.

(*d*) Sugden Vendors, 13 ed. ch. 15, s. 1.

It should be observed, however, that the decisions on this Act do not go the extent of determining that a future right of entry for a *future* breach of condition may not pass by assignment, though there are *obiter dicta* that it will not. In the cases decided, the breach giving right to enter existed at the time of the assignment. The words of the Act are large enough to include a future right on a future breach. The question is important, because the Act of Henry does not extend to covenants and conditions collateral to the land; as to pay a sum of money in gross.

Rights of entry as on a disseisin were not assignable at Common Law: the simplicity of the Common Law enjoined that every man should assert his own right of entry or of action, and not assign it to strangers, which savored of maintenance. Lord Coke says (a): "The great wisdom and policy of the sages and founders of our law have provided that *no possibility, right, title, or thing in action*, shall be granted or assigned to *strangers*, for that would be the occasion of multiplying of contentions and suits of great oppression of the people, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice." To this rule the King was always an exception (b). Any conveyance by a person disseised to a stranger was void (c), but the right might be released to the terre-tenant or person in possession claiming title.

There were cases, however, wherein, even though the possession of the possessor were adverse to the owner, he would not be deemed disseised so as to preclude him from conveying; as in the case of a tenant holding over after expiry of his term, or of a purchaser under a contract let into possession, after default in payment; or in the case of a person claiming possession adversely, between whom and the owner there was that privity and those circumstances,

(a) 10 Co. 48a. (b) *Doe Fitzgerald v. Finn*, 1 Q. B. U. C. 70.

(c) *Doe v. Scratch*, 5 U. C. Q. B. 351; *Doe v. Molloy*, 6 U. C. Q. B. 302.

that the right of the owner could not be denied by such person (a).

32 H. VIII.
c. 9, as to sale
of rights of
entry.

In affirmance of Common Law principles, by the Stat. 32 H. 8, c. 9, penalties were imposed on both the seller and the buyer (having knowledge of the facts) of the right, whether real or false, of a person disseised for more than a year before sale (b). This Act is virtually repealed by the Con. Stat., at least where an actual legal right of entry does exist, as in the case of the true owner being disseised, and where it is not the case of a mere pretended right which the claimant himself could not enforce (c).

Rights of
entry not de-
visable.

The owner whilst disseised could not, at Common Law or under the Stat. of Henry, devise (d), but there were circumstances under which mere adverse possession would not prevent a devise being valid (e). This Statute does not apply to devises, and it does not seem to be quite clear that a person disseised has now any greater power to devise than at Common Law (f).

Rights of
action not
assignable at
common law,
or now,

Rights of action were not assignable at law, on the same rules that prohibited assignments of rights of entry: nor are such rights, not partaking of the nature of rights of entry, but being mere rights, unaccompanied by a right of entry (g), as in the instance above given of a forfeiture by non-performance of a contract to convey a freehold estate, or the withholding from a widow of her present existing right to assignment of dower (h), now assignable, as not being within the Act. It follows also that they are not, by force of the Act, saleable under execution. They may, however, be released to the terre-tenant (i).

may be
released.

(a) Bishop of Toronto v. Cantwell, 12 C. P. U. C. 610, per Draper, C.J.; Bennis, q. t. v. Eddie, 2 Q. B. U. C. 286; see also 1 Jarman on Wills, 3 ed. 44.

(b) Beasley v. Cahill, 2 U. C. Q. B. 320; Baldwin v. Henderson, 2 U. C. Q. B. 388; Doe d. Williams v. Evans, 1 C. B. 717.

(c) Baby, q. t. v. Watson, 13 Q. B. U. C. 531.

(d) Jarman Wills, 3 ed. 43.

(e) Supra, as to conveyances by disseisee; Doe v. Hull, 2 D. & Ry. 38; Culley v. Doe, 11 A. & E. 1021. (f) See Con. Stat. c. 82, s. 14.

(g) See ante, p. 72.

(h) McAnnany v. Turnbull, 10 Grant, 298.

(i) Co. Litt. 265a, note 1; Miller v. Wiley, 16 C. P. U. C. 538.

In equity, assignments of these rights for valuable consideration are recognized and enforced (a); unless contrary to public policy, or partaking of champerty or maintenance, as in the case of purchase of a bare right to file a bill to set aside a conveyance for a fraud on the assignor (b); but if the right to file such a bill is a mere incident to the transaction, and the property which was the subject matter of the fraud is also conveyed, such conveyance is valid even though voluntary (c).

A right of action unaccompanied by a right of entry, as in the instances above given, is devisable as in the nature of an equitable interest (d); but a reversion in fee expectant on an estate tail which had been discontinued by the tenant in tail could not be devised (e), nor if expectant on a life estate, and the life tenant had levied a fine (f). The devisable quality of rights of action, which partake in their nature of rights of entry, are elsewhere treated of (g).

Contingent executory and future interests within this Act were not assignable at Common Law to strangers, but might, unless the object were unascertained, always be released to a terre-tenant, or person having a sufficient estate or interest by right or by wrong (h). Such releases were allowed as tending to preserve unimpaired, subsisting vested estates (i). The reason (k) why contingent and executory interests were inalienable is, that originally, in the early state of the feudal system, property was inalienable, and though in process of time, by custom, and the effect of the Stat. *Quia Emptores*, lands and estates in them became alienable;

(a) *Row v. Dawson*, *Ryall v. Rowles*, 2 W. & T. Lg. Ca. Eq., 2d ed. 612, 652.

(b) Cases last note, pp. 679, 681; *Smith Rl. and Per. Prop.* 2d ed. 787; *Prosser v. Edmonds*, 1 Y. & C. Ex. 481; *Dickinson v. Burrell*, L. R. 1 Eq. 337; *DeHoghton v. Money*, L. R. 2 Cha. App. 164; *Muchall v. Banks*, 10 Gr. 25.

(c) *Dickinson v. Burrell*, L. R. 1 Eq. 337.

(d) *Stump v. Gaby*, 2 D. M. & G. 623; *Gresley v. Mauseley*, 4 D. & J. 78; *Dickinson v. Burrell*, *supra*.

(e) 1 *Jarman Wills*, 3 ed. 43.

(f) 6 *Cruise Ten.* 38, c. 3, s. 30.

(g) See p. 74.

(h) *Smith Rl. Prop.* 3 ed. 692, 829.

(i) *Wms. Rl. Prop.* 5 ed. 240.

(k) *Wms. Rl. Prop.* 5 ed. 241.

still this did not extend to those interests which confer no estate (a), and they remained always as they originally were, for the reasons assigned by Lord Coke, as above mentioned. The true mode of explaining our laws is not to start with the notion that all estates and interests were always alienable at pleasure, and then endeavor to shew why certain kinds are not alienable, but to proceed on the converse principle.

Bound by
estoppel.

These interests might, however, have been bound at law by estoppel, on a fine, or recovery, or it would seem even on an indenture (b).

Assignments
recognized in
equity.

The assignment of these interests for valuable consideration was recognized and enforced in equity: the assignment of a contingent interest could not, before the Statute, as presently explained, operate as a present conveyance, so that on the happening of the contingency and consequent vesting of the estate it would vest in the assignee and not in the assignor, but the assignment was regarded in equity as a contract by the assignor to assign the estate when it should vest (c), and then to perfect the matter by a sufficient conveyance of such estate.

Since the act,
equity need
not be resort-
ed to except
as to bare
possibilities
and contin-
gencies in
personalty.
Effect and
operation of
the act on
assignments.

Since the Statute the jurisdiction of a Court of Equity will not require to be invoked as to the interests above referred to, though it will still be requisite as to cases of bare possibilities and contingencies as to personality.

The effect and operation of the Act may be thus shewn. Before the Act, when a contingent or other executory interest took effect on the happening of the event, or on the ascertaining of the object, and so became a vested estate, such estate, notwithstanding prior assignment of the former interest while contingent, nevertheless vested, not in the assignee but in the assignor, or party to be benefited by the original limitation; the consequence was, that to perfect the assignment and vest the estate in the assignee, a conveyance thereof to him was requisite; and,

(a) Ante, p. 67.

(b) Smith Rl. Prop. 3 ed. 829; Shelford Stat. 7 ed. 345, 346.

(c) Story's Eq. Jur. s. 1040 b.

as above explained, a Court of Equity would enforce the giving such conveyance (a). Thus, take the simple case of land granted to A for life, and in case B survived him, then to B in fee; here is a remainder contingent on the happening of an uncertain event. If B in the lifetime of A should assign his contingent interest to C and survive A, the estate in fee would vest in B, for the law in no way recognized the assignment. Since the Act, however, it is apprehended the effect of the assignment would be to substitute C for B, and consequently that the estate would vest and become executed in C.

Contingent and executory interests were devisable under the Statute of Wills of Henry VIII. (b), but as before explained in treating of devises of possibilities, if the object were unascertained at the time of devise, the devise would not take effect. Contingent interests devisable.

No disposition by force only of the Act is to defeat or enlarge an estate tail. By Con. Stat. c. 83, sec. 4, every actual tenant in tail, in possession, contingency or otherwise, may dispose of, for an estate in fee simple absolute, or less estate, the lands entailed, as against all claiming by force of an estate tail vested in, or which might be claimed by, the person making the disposition. By sec. 1 the expression "actual tenant in tail" means exclusively the tenant of an estate tail which has not been barred. Sec. 9 enacts that nothing in the Act shall enable any person to dispose of any lands entailed, in respect of any expectant interest which he may have as issue inheritable to any estate therein. The expectant heir in tail therefore cannot by force of ch. 83, defeat his own issue, or ulterior estates, and as fines, recoveries and warranties are abolished, it would seem that his power would extend only to his own life interest, and that his conveyance could be valid only in equity as a contract (c). As a contract it would seem Act does not apply to estates tail.
Conveyance by expectant heir in tail.

(a) 1 Prest. Abs. 2 ed. 98.

(b) 1 Jarman Wills, 43.

(c) Ante p. 76, 68, 69, 71. It is apprehended that the conveyance could not operate beyond a contract in equity, and would not be valid under this Act (ch. 90) to pass at law any life estate when the estate should vest in possession, as pointed out ante p. 76; and that this is so, notwithstanding the exception of the Act applies only to *defeating or enlarging an estate tail*.

it might be good notwithstanding Con. Stat. c. 83, s. 30, which only prevents the conveyance operating *under the Act*, but possibly leaves it good as a contract (a).

SECTION 6.

Certain
contingent
remainders
made valid.

A contingent remainder, which existed at any time between the thirtieth day of May, one thousand eight hundred and forty-nine, and the second day of August, one thousand eight hundred and fifty-one, shall be deemed to have been capable of taking effect, notwithstanding the determination by forfeiture, surrender or merger, of any preceding estate of freehold. 14, 15 V. c. 7, s. 6.

Variance
between this
and the Imp.
Act.

There is a most important variance between this section and the corresponding section of the Imperial Act. The omission of two words in the 6th section of Provincial Act of 14 and 15 Vic., which occur in the Imperial Act of 8 and 9 Vic., and the language in which that section is consolidated cause the variance. In England no contingent remainder can be defeated but by expiry of the particular estate by efflux of time, or according to its original limitation, before the remainder can take effect, and thus in cases of the most usual settlements, when life estates are given to persons *in esse*, with immediate remainder to their own children unborn, there is no necessity for interposing trustees to support the contingent remainders. With us, contingent remainders, except those existing between 30th May, 1849, and 2nd August, 1851, are liable to be defeated according to the Common Law rules, by the determination, by surrender, merger, or efflux of time, of the particular estate before the remainder becomes vested.

In England
contingent
remainders
indestructible
by destruction
of the
particular
estate.

Imp. Act 7 &
8 Vic. c. 76.

By the Imperial Act 7 and 8 Vic. c. 76, s. 7, contingent remainders were annulled, and for them were substituted estates having the properties of executory devises, and then existing remainders were not to fail or be destroyed by the destruction of the particular estate, unless destroyed by efflux of time, or the happening of the event on which it was limited to determine.

(a) Sugden Stats. 2nd ed. 196; Pryce v. Bury, 2 Drew 11, which, however, was not the case of an expectant heir; and see s. 37 of c. 83.

The Provincial Act, 12 Vic., c. 71, was to the same effect. Prov. Act 12 Vic. c. 71.

For reasons explained at length by Mr. Ker (a), the Imperial Act was deemed too wide, and by Imperial Act 8 & 8 and 9 Vic. c. 106, s. 1, the former Act was, as to contingent remainders, repealed retrospectively *ab initio*, and by sec. 8 it was enacted that "a contingent remainder existing at any time after 1st December, 1844, (the time of operation of the former Act), *shall be*, and if created before the passing of this Act, shall be deemed to have been, capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened." This section re-constituted contingent remainders, rendered them indestructible as therein mentioned, and prevented those, or the executory interests substituted in lieu thereof by the former Act, which owed their existence and validity to that Act, from being defeated by its retrospective repeal (b). The effect is also as above mentioned, that in most cases there is no necessity to interpose trustees to support contingent remainders. Imp. Act 8 & 9 Vic. repeals former act and re-enacts.

The Provincial Stat. 14 and 15 Vic., c. 7, repealed the former Act as to contingent remainders, but not retrospectively, and it made by sec. 6 the same enactment as above, as contained in the Imperial Act, but omitted the words "shall be." The construction placed on this by the Con. Stat. is expressed by sec. 6 of that Statute; the dates therein referred to are taken from the Stat. 14 and 15 Vic., and are the dates of the passing of the two Provincial Acts. It would seem as though the Act of 14 & 15 Vic. should have referred rather to the 31st December, 1849, than to the 30th May, as the Act of 12 Vic., though passed on the latter, did not come into operation (s. 14) till the former day, and the object of the Stat. 14 & 15 Vic. appears to have been to provide for those contingent remainders which Prov. Act 14 & 15 Vic. varies from Imp. Act. Con. Stat. varies from Imp. Act. Erroneous reference in the Act of 14 & 15 Vic. as to its operation.

(a) See his letter in App.

(b) See Browell Statutes, p. 278 note r; Davidson Conv. vol. 3, 206.

on the faith of the operation of the repealed Act, had been created without estates to trustees to preserve them. Sec. 12 apparently conflicts somewhat as to these dates, for it enacts that the foregoing sections (including sec. 6) shall not apply to any estate, right, or interest created before the 1st January, 1850; as applied to contingent remainders, sec. 12, (assuming it to conflict with sec. 6,) is nevertheless more strictly correct, and is in terms which, as above remarked, the Act of 14 & 15 Vic. should have been. See remarks under sec. 12 as to the effect of Con. Stat. c. 1.

SECTION 7.

Effect of sur- When the reversion expectant on a lease of any land merges or
render or mer- is surrendered, the estate which, for the time being, confers, as
ger of rever- against the tenant under the same lease, the next vested right to
sions expect- the same land shall, to the extent of and for preserving such inci-
ant on a lease dents to and obligations on the same reversion as, but for the
in certain surrender or merger thereof, would have subsisted, be deemed the
cases. reversion expectant on the same lease. 14, 15 V. c. 7, s. 7.

SECTION 8.

The remedies When the reversion of any land, expectant on a lease, has
for the rent merged in any remainder or other reversion or estate, the person
and cove- entitled to the estate into which such reversion has merged, his
nants in a heirs, executors, administrators, successors and assigns, shall have
lease not to and enjoy the like advantage, remedy and benefit against the les-
be extingui- see, his heirs, successors, executors, administrators and assigns,
shed by the mer- for non-payment of the rent, or for doing of waste or other for-
ger of the feiture, or for not performing conditions, covenants, or agreements
immediate contained and expressed in his lease, demise or grant, against the
reversion. lessee, farmer or grantee, his heirs, successors, executors adminis-
trators and assigns, as the person who would, for the time being,
have been entitled to the mesne reversion which has merged,
would or might have had and enjoyed if such reversion had not
so merged. 12 V. c. 71, s. 12.

S. 8 superfluous, overridden and enlarged by s. 7. Section 8, taken from the Act 12 Vic., is superfluous. In England the corresponding section was repealed by the Act 8 & 9 Vic., c. 106, which introduced a provision from which section 7 was copied in the Prov. Act of 14 & 15

Vic. Section 8 is not wide enough, it gives no reciprocity Defects in of benefit; it gives remedies *against*, but none *to*, the lessee, s. 8.

&c. Again, it does not extend to the case of the estate, in which the reversion immediately expectant on the lease has merged, becoming itself merged. Thus if A seised in fee have demised for life or for years to B, who sublets to C, who sublets to D with a covenant to D to keep the demised premises in repair; here, if whilst these estates are subsisting, C surrenders to B, his interest and the reversion expectant on the lease to D is destroyed (a). The consequence at Common Law was that D was liable to pay rent to no one, the reversion to which rent is incident being destroyed by act of the parties, and there is no privity of estate between any of them. On the other hand, there being no privity of estate, B would not be liable on the covenants of C contained in the lease to D. The same result followed if C should take a conveyance of the estate of B, and thus by the merger destroy his reversion on C's lease (b). Case of destruction of the reversion on a lease at Com. Law,

This was remedied by section 8, but, as stated above, only partially remedied by s. 8, which gave no reciprocity, and did not apply to a second merger. thus, in the case put B' might recover the rent from D, but D could have no action against B on any breach of the covenant made by C. So also, as stated above, if after the facts supposed, the estate of B had become destroyed by surrender or merger, this section would not have applied.

Sec. 7 clearly meets the above objection under sec. 8, of want of reciprocity, and apparently also the other objection. The matter (in the case put above) would stand thus: on the surrender by C to B "of the reversion expectant on a lease" to D, the estate of B is "to be deemed the reversion expectant on the same lease"; and when B surrenders to A, though B's estate may not be "the reversion expectant on a lease," referred to in the first Complete remedy by s. 7.

(a) Watk. Con. 9 ed. 56.

(b) Webb v. Russell, 3 T. R. 393; Wootley v. Gregory, 2 You. & J. 536; Burton v. Barclay, 7 Bing, 745; Thorn v. Woolcombe, 3 B. & Ad, 586; and see as to these sections, Laur v. White, 18 C. P. U. C. 99.

part of the section, (which means the *immediate* reversion formerly belonging to C,) yet it is still to be deemed the reversion expectant on the same lease *for all purposes*, even for the purpose of causing the Act again to apply on another merger of that (B's) reversion, and not merely for the purposes of preserving the incidents and obligations on C's reversion.

It has been said that the Act does not go far enough in not providing for cases of destruction of the reversion by other modes than by surrender or merger. (a).

Retrospective effect.

In England the enactment to which sec. 7 corresponds has been held retrospective (b); see however here the observations under sec 12.

The Act 4 G. II, c. 28, afforded a partial remedy in cases of leases surrendered to be renewed

Prior to secs. 7 & 8, a remedy was afforded, where leases were surrendered for the purpose of being renewed, by Stat. 4 Geo. 2, c. 28, sec. 6, the effect of which is that in such case the new lease is valid to all intents as if the underlease had been surrendered before the taking of the new lease; and the remedies of the lessees against their under-tenants remain unaltered, and the chief landlord has the same remedy by distress and entry for the rents and duties reserved in the new lease, so far as they exceed not those in the former lease, as he would have had in case the former lease had continued (c).

SECTION 10.

No implied warranty, &c., to be created by the word "grant" or "exchange."

10. Neither the words "Grant" or "Exchange," in any deed, shall create any warranty or right of re-entry, or covenant by implication, except in cases where by any Act in force in Upper Canada, it is declared that the word "Grant" shall have such effect. 12 V. c. 7, s. 6.

A grant in fee or for grantor's whole estate implied no warranty.

The supposition that the word grant created a warranty or covenant by implication seems to have been founded in error, at least when a fee was conveyed, or the whole of the grantor's estate; but in a lease for years rendering

(a) Davidson Con. Prec. 6 ed. p. 32; 7 ed. 33.

(b) Upton v. Townsend, 17 C. B. 30.

(c) See Doe d. Palk v. Marchetti, 1 B. & Ad. 715.

rent it implied a general covenant for quiet enjoyment ; Express cove-
no implied covenant or warranty, however, arose if there nants destroy-
were an express covenant on the subject (a). ed the implied
warranty.

The warranty and right of re-entry arising at Common Exchange,
Law on the word Exchange was before explained in treat-
ing of sec. 4 (b).

This section should have extended to a *partition* and to On a partition
the word *give* ; for on a partition a right of re-entry on warranty still
eviction may arise as before explained (c) ; and the word implied.
give yet continues in some cases to imply a warranty of title. The word
Thus, it is said on a gift in tail or lease for life rendering *give* still im-
rent, the donor or lessor and his heirs (to whom the rent is plies a war-
payable) are bound to warrant the title (d) : and on a ranty.
feoffment in fee since the Statute *quia emptores* the feoffor
during his life is bound to warrant, and before that Act
the warranty extended to his heirs if the lands were to be
held of, and services rendered to, the feoffor and his heirs (e).
By the Imperial Act the word *give* implies no warranty.

SECTION 9.

9. The *bond fide* payment of any money to, and the receipt there- Receipts of
of by any person to whom the same is payable upon any express Trustees to be
or implied trust, or for any limited purpose, and such payment to effectual dis-
and receipt by the survivors or survivor of two or more mort- charges.
gagees or holders, or the executors or administrators of such
survivor, or their or his assigns, shall effectually discharge the
person paying the same from seeing to the application, or being
answerable for the misapplication thereof, unless the contrary be
expressly declared by the instrument creating the trust or secur-
ity. 12 V. c. 71, s. 10.

The first part of this is framed to meet the rule in equity,
that if the trust be of such a nature that the person paying

(a) Co. Litt. 384 a, note 1; 4 Cru. Dig. by White, 370; Line v. Ste-
phenson, 5 B. N. C. 183.

(b) Ante p. 56. (c) Ante p. 55. (d) Black. Com. vol. 2, p. 300.

(e) 2 Black. 300; Co. Litt. 384 and note 1, whence it would seem that
an express warranty in such case would not override the implied war-
ranty, Wms. Rl. Prop. 376; 8 ed. 428.

the trustees may reasonably be expected to see to the application of the money, he will be bound to do so. The rule and the exceptions are given fully in the text books (a); they may be briefly illustrated by stating that if the trust be for payment of legacies, on specified scheduled debts, the purchaser has to see that the money is properly applied, but not so when the trust is for payment of debts generally.

Payment to trustees must be made to all, not to one. This section does not prevent the application of the rule requiring payment to trustees to be made to all jointly, or on their joint receipt, or to their attorney authorized by all to receive the money (b).

Imp. Acts. The Imperial Act of 7 & 8 Vic. c. 76, had a clause corresponding to this section, but for the reasons given by Mr. Ker (c) it was deemed too extensive, and was repealed by the Act of 8 & 9 Vic. c. 106, and subsequently was re-enacted as to trustees only, in less extensive terms, by the Stat. 22 & 23 Vic. c. 35, s. 23, which confines the protection to payment of *purchase or mortgage* money. A subsequent Act, however, 23 and 24 Vic. c. 145, s. 29, again gave a wider effect to the receipts of trustees.

Payment to surviving mortgagee. The object of that part of this section which relates to payment to surviving mortgagees is explained in Mr. Ker's letter (d).

This section is confined in its operation by section 12, to matters subsequent to 1st January, 1850 (e). There might be some difference of opinion as to whether under the original Act of 12 Vic., the power to give receipts extends to trusts created before that Act (f).

(a) Sug. Vend. 13 ed. 540; Dart Vend. 3 ed. pp. 384 et seq; Davidson Conv. vol. 3, p. 162, note r.

(b) Ewart v. Snyder, 13 Grant, 57, per Mowat. V. C. Payments to the attorney of all have been questioned, Davidson Conv. vol. 3, p. 162, note r; Sugden Vendors, 13 ed. 549; but see Davidson Conv. vol. 2, p. 256, note c.

(c) See his letter in App.

(d) See his letter in App.; see also chapter on mortgages.

(e) See the observations on that section.

(f) See 5 Jur. N. S. pt. 2, pp. 441, 442, where this section is treated of; 2 Davidson Conv. vol. 3, 2 ed. 164, note w; Lewin on Trusts, p. 224, 4th ed.; Bennett v. Lytton, 2 J. & H. 158.

Payment to a trustee, with notice of intention on his part to commit a breach of trust, would not, it seems, be within the protection of this section (a). Payment mala fide.

SECTION 12.

12. The foregoing sections of this Act shall not extend to any deed, act or thing executed or done, or to any estate, right or interest created before the first day of January, one thousand eight hundred and fifty, but they shall extend to and have operation and effect on and from that day. This Act not to extend to deeds, &c., executed before 1st Jan., 1850. 12 V. c. 71, s. 14.

It would seem that this section is a new enactment so far, at least, as relates to sections 2, 3, 4, 5, 6, 7 & 11, and varies from the Acts consolidated by this Statute, unless controlled by Con. Stat. U. C. ch. 1, secs. 5, 6, 7, 8, 9. The variance seems to have arisen thus: the Act of 12 Vic. was not retrospective, except as to contingent remainders (see its sec. 14); neither was the Imperial Statute 7 & 8 Vic. from which it was taken. The Imperial Act 8 & 9 Vic. repealed *in toto* the former Imperial Act, and re-enacted in better terms, and with some variance, most of its provisions: it designedly, and for ample reason, was retrospective in its operation (b). Our Legislature followed the English Legislature, except in one or two particulars: by the Act of 14 & 15 Vic. they repealed all the clauses of the former Act, except those to which secs. 8, 9 & 10 of Con. Stat. respectively answer, the interpretation clause, and that confining the Act to Upper Canada, and also sec. 14 the restriction clause, to which latter the sec. 12, now in question, of the Con. Stat. answers. This sec. 14 was not repealed by reason of certain clauses as above-named being retained, but as regards the repealed clauses, it fell of itself, and even though the subject matter of those clauses should have been re-enacted in the same terms as before (which

(a) Lewin on Trusts, 5 ed. 240, referring to *Fernie v. Maguire*, 6 Ir. Eq. Rep. 137.

(b) See the final part of Ker's letter in Appendix, who framed the Bill; *Upton v. Townend*, 17 C. B. 30.

they were not) still that sec. 14 would not have applied. Thus, sec. 5 of 12 Vic. gave the right to convey a contingent interest, and right of entry *for condition broken*, unless (by sec. 14) such right or interest were created before 1st January 1850 inclusive. Sec. 5 of 14 & 15 Vic. gave the right to convey a contingent interest and a right of entry, which right, as above explained, varies from that alluded to in the former Act : this section, therefore, varies from the old Act; there is no restrictive clause to the later Act, and clearly sec. 14 of the former Act would not apply; moreover, as above explained, the later Act was intended to be retrospective. The result is, that though a right of entry on a disseisin prior to 1850, and a contingent interest created before 1850 were, by 14 & 15 Vic., capable of being validly conveyed, the Con. Stat. varies the law and withholds from the owner disseised the power he theretofore had of selling and conveying the estate, leaving him in fact as at common law (a); and places a person entitled to a contingent interest in the same position, except that the conveyance would be valid in equity as a contract to be perfected by conveyance, when the interest becomes a vested estate (b). The above observations apply to other cases, as, for instance, under sec. 4.

Rules of construction peculiar to the Con. Stats. on variance between them and the former acts.

When any question of variance arises between Consolidated Statutes and the old Statutes consolidated, reference should be had to Con. Stat. U. C. c. 1. ss. 5, 6, 7, 8, 9, which it may be contended control the operation of the section 12, now under consideration. In construing a Consolidated Statute reference should be made also to the Interpretation Act, section 18. If there be no direct variance between a Consolidated Statute and the former Statute which is consolidated, the old Statute may be looked at to guide in the construction of the new Consolidated Act (c).

(a) As to which see, post, the remarks on conveyances of contingent interests, pp. 73, 74.

(b) See p. 76.

(c) Per Draper, C. J., in *Bank Upper Canada v. Brough*, 2 E. & A. Reports U. C., 101; *The Queen v. Whelan*, 28 Q. B. U. C. 117.

SECTION 13.

13. Any Corporation aggregate in Upper Canada, capable of Corporations taking and conveying land, shall be deemed to have been and to aggregate be capable of taking and conveying land by deed of bargain and may convey sale, in like manner as any person in his natural capacity, subject and sale. nevertheless to any general limitations or restrictions and to any special provisions as to holding or conveying real estate which may be applicable to such Corporation. 4 W. IV, c. 1, s. 46.

So far as regards capacity to *take* by way of bargain and sale, the provision of this section was superfluous (a); and it would seem by no means certain that a Corporation might not convey by the same mode.

It has been said that though a Corporation could not become feoffee to uses of lands owned and conveyed by a feoffor, yet they might become seised to uses of their own lands (b). Thus A could not enfeoff or release to a Corporation to hold to the use of B, but a Corporation might agree to be seised of their own lands to the use of B, and so convey by way of bargain and sale (c). Admitting, however, that of their own lands a Corporation might stand seised to uses, it is difficult to say how the uses declared are executed by the Statute of Uses, considering the language of that Statute, and why they do not therefore remain trusts enforceable and recognized only in Equity; for the Statute executes the use only "where any *person or persons*," shall be seised of any lands, &c., "to the use, confidence, or trust of any other *person or persons or body politic*" (d).

In practice, the above distinction was, however, not acted on, and authority is not wanting that a Corporation could not under any circumstances stand seised to uses,

(a) 1 Saunders on Uses, 60; Gilbert on Uses, 3 ed. by Sugden, p. 191; Jones on Uses, 40; see also the language of the Statute of Uses, p. 90.

(b) See note by Sugden to Gilbert on Uses, 3 ed. p. 7; also Preston Con. vol. 2, p. 234; Jones on Uses, p. 40.

(c) See last note. It is treated as doubtful in Grant on Corporations.

(d) See Bacon on Uses, and the language of the Act, post, under sec. 14 of this Act.

either as feoffees or releasees of lands of others, or as bargainors of their own lands. It was once a maxim with respect to a feoffee to uses that there should be *confidence in the person*, and it was ruled that for want of this a Corporation could not stand seised to a use, for how, it was said, could a Corporation be confided in when it had not a soul? (a). Another reason assigned was that a Corporation was framed at the will of the King for certain purposes, and was no further capable than he willed them, and, moreover, that being incorporate, the Chancery had no process to compel them to discharge the use or trust (b). This latter ground has long since ceased to exist, and with it the necessity for personal confidence (c). A strong argument as against a Corporation standing seised to a use, is furnished by the language of the Statute of Uses above referred to, which does not take in the case of a Corporation seised to a use, from which it is to be inferred that the Legislature supposed a Corporation could not so stand seised (d).

Importance of the question, whether a corporation can stand seised to a use.

It is to be observed that the section under consideration does not enact that a Corporation may stand seised to a use, but only gives it capability to convey by bargain and sale, and therefore, in any case in which a Corporation should be made grantee or releasee to uses, the matters above considered become of importance in determining whether the uses declared are valid as such, and if so, whether the Statute of Uses would execute them. It would seem both points must be answered in the negative. Again, if it be that a Corporation could not stand seised to a use of its own lands even, then, as this section gives no such power, but merely gives power to convey by bargain and

(a) Lewin on Trusts, introduction, p. 2; see also 1 Saunders on Uses, 59.

(b) Gilbert Uses, 3 ed. by Sugden, pp. 6, 7, 367,

(c) Lewin Trusts, introduction, p. 9; note, by Sugden, to Gilbert on Uses, p. 7; 1 Ves. Jr. 468; 1 Ves. Sen. 536.

(d) Bacon on Uses; see also notes, by Sugden, to Gilbert on Uses, 3 ed. pp. 6, 7.

sale, it might be urged that such a conveyance from a Corporation would operate as a statutory grant, or Common Law conveyance, transferring the estate to the grantee without any use raised in the Corporation, (of which they could not stand seised), and without the aid of the Statute of Uses. If this be so, and if no use be raised in the Corporation by reason of their incapacity to stand seised, then any use declared on the seisin of the bargainee, being the first use, would be executed in favor of the *cestui qui use*, giving him the legal estate, and would not give him a mere equitable interest, as would be the case on a bargain and sale by an individual to a bargainee to hold to the use of another. It is presumed, however, the Courts would give the same effect to a bargain and sale by a Corporation as by an individual as regards uses declared, and would consider that virtually this section enables a Corporation, on the bargain and sale, to stand seised to the use of the bargainee (a).

SECTION 14.

No deed of bargain and sale of land in Upper Canada, executed subsequent to the 6th day of March, one thousand eight hundred and thirty-four, shall require enrolment or registration to supply the place of enrolment, for the mere purpose of rendering such bargain and sale a valid and effectual conveyance for passing the land thereby intended to be bargained and sold; but this shall not affect any question of priority under the Registry Act. 4 W. VI, c. 1, s. 47,—13, 14 V. c. 63, s. 3.

Deed of bargain and sale shall not require enrolment to render it a valid conveyance.

At Common Law no deed or writing was requisite to create, or rather as evidence of the creation of, an use, which was then in effect what is now a trust. The verbal bargain on sufficient consideration, raised the use in the bargainor to hold for the bargainee; on this the Court of Chancery held the bargainor, who continued to retain the legal estate, to be trustee for the bargainee, who was entitled to the whole beneficial use, which was descendible, devisable, and assignable without livery.

Uses and bargain and sale at common law.

(a) See, however, Hayes Conv. vol. 2, 5th ed., p. 80, note 64.

Stat. of Uses.

Language of
s. 1 of St. of
Uses.

The object of the Statute of Uses was to abolish the doctrine of trusts, and to annex the legal ownership to the beneficial interest. Its language is as follows:—"That where any person or persons stand or be seized, or at any time hereafter shall happen to be seized of and in any honors, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner, means, whatsoever it be; in every such case, all and every such person and persons and bodies politic, that have or hereafter shall have any such use, confidence or trust in fee simple, fee-tail, for term of life, or for years, or otherwise, or any use, confidence or trust in remainder or reverter, shall from henceforth stand and be seized, deemed and adjudged in lawful seizin, estate and possession of and in the same honors, &c., with their appurtenances, to all intents, constructions and purposes in the law of and in such like estates as they had or shall have in the use, trust or confidence of or in the same; and that the estate, title, right and possession that was in such person or persons that were or hereafter shall be seized of any lands, tenements, or hereditaments, to the use, confidence or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter shall have such use, confidence or trust after such quality, manner, form and condition as they had before, in or to the use, confidence or trust that was in them."

Effect of St.
of Uses on a
bargain and
sale.

The Statute failed to attain its object, and to destroy trust estates, by reason of its being considered that the Statute exhausted itself in executing the first use declared and was powerless as regards any further use, which is a *trust* as now recognized in Courts of Equity. The effect of the Act was to introduce a new and secret mode of conveyance, passing the legal estate without livery, and

by the mere verbal bargain or contract of sale on sufficient consideration; nor were any words of inheritance requisite to carry a fee, as a contract for a fee was implied, unless the contrary were expressed (a).

The Statute of Enrolments, 27 H. 8, c. 16, was passed with a view to prevent the clandestine character of the conveyance by way of bargain and sale, and denies effect to every such conveyance of a freehold "except the same be by writing, indented, sealed and enrolled in one of the King's Courts of Record at Westminster," or within the County where the lands lay, before the *Custos Rotulorum* and two Justices of the Peace and the Clerk of the Peace of the same County, or any two of them, whereof the Clerk to be one, and the enrolment to be within six months after date of the instrument. St. of Enrolments.

The first Provincial Act on the subject, 37 Geo. 3, ch. 8, recited, that conveyances by way of bargain and sale "not having been enrolled in a Court of Record are not valid in law," and substituted therefor the County Registry Office, with a retrospective operation (b). The Statute, 4 Wm. 4, ch. 1, sec. 47, abolished the necessity for any enrolment or registry, except to preserve priority of title under the Registry Act; this Act was held to be retrospective (c). The Stat. 9 Vic. ch. 34, sec. 14, declared that registry should be equivalent to enrolment, but this was repealed by Stat. 13 & 14 Vic. ch. 63, sec. 3, reciting that the effect of the former Act might be to render doubtful the meaning of the Act of 4 Wm. 4. Provincial Acts as to bargains and sales.

These Statutes, combined with a decision (d) that a deed poll may operate as a bargain and sale, have virtually repealed the Statute of Enrolments.

A bargain and sale to operate under the Statute of Uses cannot be good, except on the consideration of money or money's worth; a rent reserved, though but a pepper-corn The consideration requisite as to bargain and sale,

(a) Jones on Uses. (b) Rogers v. Barnum, 5 Q. B. O. S. U. C. 252.

(c) Rogers v. Barnum, supra; Doe d. Louckes v. Fisher, 2 Q. B. U. C. 470.

(d) Rogers v. Barnum, supra.

will suffice (a). If a valuable consideration be proved to have been given, though not expressed, or if expressed, though proved not to have been given, it will suffice (b). The consideration need not proceed from the bargainee to the bargainor (c).

it may operate as a grant or otherwise,

If the instrument fail to take effect as a bargain and sale for want of proper consideration, or otherwise, it may operate as a grant or covenant to stand seized on consideration of blood, or otherwise, as before explained (d).

incorporeal hereditaments cannot be created by it,

Not only corporeal, but also incorporeal hereditaments may be conveyed by bargain and sale; but the latter must be in existence at the time of conveyance. Therefore a thing not *in esse*, as a right of way not before created, cannot be created by bargain and sale (e). The Statute of Uses (f) executes the use "when any person shall be seised, &c., to the use, &c.," and therefore though a freeholder can create a term by bargain and sale out of the estate of which he is seised, no term when once created can be so conveyed, for of such the termor is not seised but possessed. Contingent interests and possibilities cannot be conveyed by bargain and sale (g).

nor terms of years or contingent interests conveyed by it.

Other matters and disadvantages attending this mode of conveyance, were before referred to (h).

(a) 4 Cruise, T. 32 ch. 9, secs. 25, 26; Smith Rl. Prop. 3 ed. 656.

(b) Smith Rl. Prop., 3 ed. 656.

(c) Id.

(d) Ante p. 51.

(e) Smith Rl. Prop., 3 ed. 656.

(f) See the language of the Act, ante p. 90.

(g) Watkins Conv. 355, 9 ed.

(h) Ante pp. 49, 50.

CON. STAT. CH. 91.

An Act respecting short forms of Conveyances.

1. When a deed made according to the forms set forth in the first Schedule to this Act, or any other deed expressed to be made in pursuance of this Act, or referring thereto, contains any of the forms or words contained in column one of the second Schedule hereto annexed, and distinguished by any number therein, such deed shall be taken to have the same effect, and be construed as if it contained the form of words contained in column two of the same Schedule, and distinguished by the same number as is annexed to the form of words used in the deed ; but it shall not be necessary, in any such deed, to insert any such number. 9 V. c. 6, s. 1.

Where words of column 1 of the second Schedule are employed, the deed to have the same effect as if the words in column 2 were inserted.

2. Any deed or part of a deed, which fails to take effect by virtue of this Act, shall, nevertheless, be as effectual, to bind the parties thereto, so far as the rules of law and equity will permit, as if this Act had not been made. 9 V. c. 6, s. 4.

Deeds failing to take effect under this Act to be as valid as if Act not made.

3. Every such deed, unless an exception be specially made therein, shall be held and construed to include all houses, out-houses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, water-courses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever, to the lands therein comprised, belonging or in any wise appertaining, or with the same demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof; and if the same purports to convey an estate in fee, also the reversion or reversions, remainder and remainders, yearly and other rents, issues and profits of the same lands, and of every part and parcel thereof, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever, both at law and in equity, of the grantor in, to, out of, or upon the same lands, and every part and parcel thereof, with their and every of their appurtenances. 9 V. c. 6, s. 2.

Deed to include all houses, &c., and the reversion, and all the estate, &c.

Construction
of Act.

4. In the construction of this Act, and the Schedules thereto, unless there be something in the subject or context repugnant to such construction, the word "lands" shall extend to all freehold tenements and hereditaments, whether corporeal or incorporeal or any undivided part or share therein, respectively; and the word "party" shall mean and include any body politic or corporate or collegiate as well as an individual. 9 V. c. 6, s. 5.

Remunera-
tion for deeds
under the Act
not to be by
length only.

5. In taxing any bill for preparing and executing any deed under this Act, the taxing officer, in estimating the proper sum to be charged therefor, shall consider not the length of such deed, but the skill and labour employed and responsibility incurred in the preparation thereof. 9 V. c. 6, s. 3.

Schedules,
&c., to form
part of Act.

6. The Schedules, and the directions and forms therein contained, shall be deemed parts of this Act. 9 V. c. 6, s. 6.

THE FIRST SCHEDULE.

This Indenture, made the _____ day of _____, one thousand eight hundred and _____, in pursuance of the Act to facilitate the conveyance of real property, between (*here insert names of parties and recitals, if any,*) Witnesseth, that in consideration of _____ dollars, of lawful money of Canada, now paid by the said (grantee or grantees) to the said (grantor or grantors) (the receipt whereof is hereby by him (*or them*) acknowledged,) he (*or they*) the said (grantor or grantors) doth (*or do*) grant unto the said (grantee or grantees) his (*or their*) heirs and assigns for ever, all, &c., (*parcels.*) (*Here insert covenants, or any other provisions.*)

In witness whereof, the said parties hereto have hereunto set their hands and seals.

THE SECOND SCHEDULE.

DIRECTIONS AS TO THE FORMS IN THIS SCHEDULE.

In cases of Sale and Conveyance of Real Property.

1. Parties who use any of the forms in the first column of this Schedule, may substitute for the words "covenantor" or "covenantee," or "releasor" or "releasee," "grantor" or "grantee," any name or names, and in every such case, corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in any of the forms in the first column of this Schedule, and corresponding changes shall be taken to be made in the corresponding forms in the second column.

3. Such parties may introduce into, or annex to, any of the forms in the first column, any express exceptions from, or other express qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.

4. Such parties may add the name or other designation of any person or persons, or class or classes of persons, or any other words, at the end of form two, of the first column, so as thereby to extend the words thereof to the acts of any additional person or persons, or class or classes of persons, or of all persons whomsoever; and in every such case the covenants two, three and four, or such of them as may be employed in such deed, shall be taken to extend to the acts of the person or persons, class or classes of persons, so named.

COLUMN ONE.

1. The said
(*covenantor*)
covenants
with the said
(*covenantee*).

2. That he
has the right
to convey the
said lands to
the said (*cove-
nantee*) not-
withstanding
any act of the
said (*cove-
nantor*.)

3. And that
the said (*cove-
nantee*) shall
have quiet
possession of
the said lands.

COLUMN TWO.

1. And the said covenantor doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree, with and to the said covenantee, his heirs and assigns, in manner following, that is to say :

2. That for and notwithstanding any act, deed, matter or thing by the said covenantor, done, executed, committed, or knowingly or wilfully permitted or suffered to the contrary, he, the said covenantor, now hath in himself good right, full power, and absolute authority, to convey the said lands and other the premises hereby conveyed, or intended so to be, with their and every of their appurtenances, unto the said covenantee, in manner aforesaid, and according to the true intent of these presents.

3. And that it shall be lawful for the said covenantee, his heirs and assigns, from time to time and at all times hereafter, peaceably and quietly to enter upon, have, hold, occupy, possess and enjoy the said land and premises hereby conveyed, or intended so

SHORT FORMS OF CONVEYANCES,

COLUMN ONE.

4. Free
from all in-
cumbrances.

5. And the
said (*cove-
nantor*) cove-
nants with the
said (*cove-
nantee*) that
he will exe-
cute such
further assur-
ances of the
said lands as
may be re-
quisite.

COLUMN TWO.

to be, with their and every of their appurtenances ; and to have, receive and take the rents, issues and profits thereof, and of every part thereof, to and for his and their use and benefit, without any let, suit, trouble, denial, eviction, interruption, claim or demand whatsoever of, from, or by him the said covenantor, or his heirs, or any person claiming, or to claim, by, from, under, or in trust for him, them, or any of them.

4. And that free and clear, and freely and absolutely acquitted, exonerated, and for ever discharged, or otherwise by the said covenantor or his heirs well and sufficiently saved, kept harmless, and indemnified of, from and against any and every former and other gift, grant, bargain, sale, jointure, dower, use, trust, entail, will, statute, recognizance, judgment, execution, extent, rent, annuity, forfeiture, re-entry, and any and every other estate, title, charge, trouble and incumbrance whatsoever, made, executed, occasioned, or suffered by the said covenantor or his heirs, or by any person claiming, or to claim, by, from, under or in trust for him, them, or any of them.

5. And the said covenantor doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree with, and to the said covenantee, his heirs and assigns, that he the said covenantor, his heirs, executors and administrators, and all and every other person whosoever having or claiming, or who shall or may hereafter have or claim, any estate, right, title or interest whatsoever, either at law or in equity, in, to, or out of, the said lands and premises hereby conveyed, or intended so to be, or any of them, or any part thereof, by, from, under, or in trust for him, them, or any of them, shall and will, from time to time, and at all times hereafter upon every reasonable request, and at the costs and charges of the said covenantee, his heirs or assigns, make, do, execute or cause to be

COLUMN ONE.

COLUMN TWO.

made, done, or executed, all such further and other lawful acts, deeds, things, devices, conveyances, and assurances in the law whatsoever, for the better, more perfectly, and absolutely conveying and assuring the said lands and premises hereby conveyed, or intended so to be, and every part thereof, with their appurtenances, unto the said covenantee, his heirs and assigns, in manner aforesaid, as by the said covenantee, his heirs and assigns, his or their counsel in the law, shall be reasonably devised, advised or required, so as no such further assurances contain or imply any further or other covenant or warranty than against the acts and deeds of the person who shall be required to make or execute the same, and his heirs, executors or administrators, only, and so as no person who shall be required to make or execute such assurances, shall be compellable for the making or executing thereof, to go or travel from his usual place of abode.

6. And the said (covenantor) covenants with the said (covenantee) that he will produce the title deeds enumerated hereunder, and allow copies to be made of them, at the expense of the said (covenantee).

6. And the said covenantor, doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree with and to the said covenantee, his heirs and assigns, that the said covenantor and his heirs shall and will, unless prevented by fire or other inevitable accident, from time to time, and at all times hereafter, at the request, costs and charges of the said covenantee, his heirs or assigns, or his or their attorney, solicitor, agent, or counsel, at any trial or hearing in any action or suit at law or in equity, or other judicature, or otherwise, as occasion shall require, produce all and every or any deed, instrument or writing hereunder written, for the manifestation, defence and support of the estate, title and possession of the said covenantee, his heirs and assigns, in, or to, the said lands and premises hereby conveyed, or intended so to be, and at the like request, costs and charges, shall and will make and deliver, or cause to be made and delivered, true and attested, or

COLUMN ONE.

COLUMN TWO.

other copies or abstracts of the same deeds, instruments and writings respectively, or any of them, and shall and will permit and suffer such copies and abstracts to be examined and compared with the said original deeds, by the said covenantee, his heirs and assigns, or such persons as he or they shall for that purpose direct and appoint.

7. And the said (*covenantor*) covenants with the said (*covenantee*) that he has done no act to incumber the said lands.

7. And the said covenantor, for himself, his heirs, executors and administrators, doth hereby covenant, promise and agree with and to the said covenantee, his heirs and assigns, that he hath not at any time heretofore made, done, committed, executed, or wilfully or knowingly suffered any act, deed, matter or thing whatsoever, whereby or by means whereof the said lands and premises hereby conveyed, or intended so to be, or any part or parcel thereof, are, is, or shall or may be in any wise impeached, charged, affected, or incumbered in title, estate or otherwise howsoever.

8. And the said (*releasor*) releases to the said (*releasee*) all his claims upon the said lands.

8. And the said releasor hath released, remised and forever quitted claim, and by these presents doth release, remise, and forever quit claim, unto the said releasee, his heirs and assigns, all and all manner of right, title, interest, claim, and demand whatsoever, both at law and in equity, into and out of the said lands and premises hereby granted, or intended so to be, and every part and parcel thereof, so as that neither he nor his heirs, executors, administrators, or assigns, shall nor may, at any time hereafter, have, claim, pretend to, challenge or demand the said lands and premises, or any part thereof, in any manner howsoever, but the said releasee, his heirs and assigns, and the same lands and premises shall from henceforth for ever hereafter be exonerated and discharged of and from all claims and demands whatsoever, which the said releasor, might or could have upon him in respect of the said lands, or upon the said lands.

9. And the said (A. B.)

9. And the said (A. B.) wife of the said (*grantor*), for and in consideration of the sum of

COLUMN ONE.

wife of the said (*grantor*) hereby bars her dower in the said lands.

COLUMN TWO.

dollars, of the lawful money of Canada, to her in hand paid by the said (*grantee*) at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted and released, and by these presents doth grant and release unto the said (*grantee*) his heirs and assigns, all her dower and right and title which in the event of surviving her said husband, she might or would have to dower, in, to, or out of the lands and premises hereby conveyed, or intended so to be.

This Act is taken from the Imperial Act 8 & 9 Vic., ch. 119, and its object is to relieve from the labor of inserting covenants at length, and all the estate clause, &c., and give to a conveyance drawn under it, using the short forms, the same efficacy and effect as would have been given to it if drawn irrespective of the Act, with the use of the corresponding lengthy forms. A recent case (*a*), however, would seem to indicate that, under certain circumstances, a conveyance may be aided in its effect if expressed to be drawn "in pursuance of the Act to facilitate the conveyance of real property." In one case (*b*) an indenture dated in 1852 (*c*), expressed to be drawn in pursuance of the Act to facilitate, &c., for a consideration of £75, with a limited covenant for possession and further assurance, was held sufficient to pass the fee, though the only operative words were *quit claim* and *release*, and the releasee had neither possession nor estate whereon a release could operate. McLean, C. J., and Burns, J., particularly referred to the fact that the deed was expressed to be in pursuance of the Act to facilitate the conveyance of real property, and that it contained covenants for possession and further assurance.

Imp. Act 8 & V. c. 119.

Has a conveyance referring to the act an effect it otherwise would not have?

(a) Cameron v. Gunn, 25 Q. B. U. C. 77.

(b) Nicholson v. Dillabough, 21 Q. B. U. C. 595.

(c) The date given to the indenture in the report is a misprint; the date there given is 1842, but the Act was not passed till 9 Vic. The prior part of the report gives the correct date.

In the next case (a) the defendant, by deed, dated in 1865, *remised, released, and forever quitted claim* to the plaintiff for a consideration of 5s., and without covenants. The Court referred to the fact that the former case was expressed to be in pursuance of the Act, that it was for £75, and contained a covenant that the purchaser might enter and take possession, all which they said was wanting in the case before them, and the instrument was held inoperative as either a release, grant, or bargain and sale. Considering that the Court merely distinguished the cases on the grounds above mentioned ; considering also that to the validity of a bargain and sale, a consideration of 5s. is as sufficient as a consideration of £75, and that to the validity of a deed as a grant, no consideration is requisite (at least when expressed to be to the use of the grantee, so as to prevent the use resulting to the grantor), it would seem that the Court, in denying efficacy to the deed, must (if they recognized the former case as law) have relied on the fact that it was not expressed to be in pursuance of the Act to facilitate the conveyance of real property, and contained also no covenants for possession or further assurance, and probably chiefly on the latter grounds (b).

It should be remembered that there is no longer an Act entitled "an Act to facilitate the conveyance of real property;" the original Act of 9 Vic. so entitled having been consolidated, and entitled "an Act respecting short forms of conveyances;" a corresponding change was omitted, however, in the first schedule.

On the whole it is submitted that at present a mere reference to this Act will not give a conveyance any greater efficacy than otherwise it would have, except as pointed out in the Act.

The operative word *grant* made use of by mistake.

There is a singular mistake in this Act, in that the only operative word made use of is the word "grant," whereas

(a) *Cameron v. Gunn*, *supra*.

(b) See the observations of Draper, C. J., and Morrison, J., in *Acre v. Livingstone*, 26 Q. B. U. C. pp. 285, 288, 296 ; but see, per Hagarty, J., 292.

lands, that is the immediate freehold, did not at the time of the passing of the Act lie in grant, nor was it till some time afterwards that lands acquired that capacity (a). The error arose from copying the English Act without attention to the fact, that at the time of passing the Act in England, lands there did lie in grant. The error is important, because in some cases a conveyance may be found to fail entirely, and in other cases only to operate by the raising of a use when it was not intended, and thus causing the uses expressly declared, to be but uses on a use, and therefore trusts. Whatever doubt there may be as to whether words of release only may operate as a grant or bargain or sale (b), there can be no doubt that a deed using only "grant" as an operative word, may take effect as a bargain and sale, if on a pecuniary consideration, or as a covenant to stand seised if on a consideration of blood or marriage, or as a release if there be possession or a vested estate whereon it can operate, or as an assignment, surrender, and in other modes. The nugatory grant therefore might be valid as a bargain and sale, or covenant to stand seised, but in such cases, if uses were declared, it would be attended with the results above alluded to, of misplacing them and also the legal estate, by the use being raised, unintentionally, yet necessarily, in the bargainer or covenantor. Thus, if A, in anticipation of marriage, had by way of settlement, *granted* to B and his heirs, to the use of him A and his heirs till marriage, and thereafter to other uses declared, the instrument would have been void as a grant; and though if a pecuniary consideration had been expressed, it might have operated as a bargain and sale, then the fee would have been in B in trust for A, and not in A, as intended; and if the marriage had happened, the uses declared, which it was intended should confer legal estates, as being executed in possession by the

The word *grant* may operate as a bargain and sale, release, &c.

But if it operates as a bargain and sale, the deed may not operate as intended.

(a) 14 & 15, Vic. c. 7, s. 2; Con. St. c. 90, s. 2; see however the effect of 12 Vic. c. 71, s. 2, repealed by 14 & 15 Vic. c. 7,

(b) See *Cameron v. Gunn*, and *Nicholson v. Dillabough*, *supra*, in the text and notes.

Statute of Uses, would have been mere trusts. So also, if A had granted to B, in fee, to the use of him, A, and another, in fee, with a view to vest the estate in himself and such other jointly, (a case very likely to have occurred on appointment of a new trustee), the deed was either inoperative, or if it could have operated as a bargain and sale, the legal estate would have been in B. In the above and the like cases the intention was that the instrument should operate as a conveyance at Common Law, and that the first use raised should be in the grantee to uses, and this would be so, and the instrument would so operate now that lands lie in grant; but if it can only be supported as a bargain and sale, or covenant to stand seised, the first use raised is of course in the bargainor or covenantor.

If the instrument could be supported as a Common Law conveyance by way of release, it would work as intended but this presupposes possession, or some vested estate, at least, in the releasee. Possibly the Act of 12 Vic. ch. 71 sec. 2 (repealed) might aid the want of possession, or of estate, in cases of grants after that Act: the construction of that section is, however, as pointed out by Mr. Ker, very obscure (a).

Caution
required in
the use of the
forms.

Great caution appears requisite in the use of this Act, and the forms in its schedules are, in strictness, appropriate only to the most simple conveyances. The form in the first schedule is that of a grant in fee simple, and the covenants in the second section are framed with reference to an assurance of that simple description; and it may be useful to impress upon parties who choose to avail themselves of the Act, that more than usual care will be necessary to have their deeds accurately engrossed. The Act gives a particular efficacy to a particular form of words, and the slightest deviation from that form will endanger the operation of the Statute with reference to the covenant in which the mistake occurs; and such covenant may then, under the second section, be left to the very doubtful effect it may have by its own independent operation.

(a) See letter of Mr. Ker, in Appendix.

Section 3 of schedule 2 authorizes the introduction of exceptions and qualifications of the covenants, but for the reasons above given it is dangerous to interfere with the forms, unless in very clear cases, for it may not be easy to determine what is the introduction of an exception or qualification. Thus the superadding to the covenant for right to convey free from incumbrance, the words "except a certain mortgage dated, &c.," would clearly be within the authority; but in the very common case of *striking out* the words "notwithstanding any act of the said covenantor" with a view to render the covenant for right to convey, and all *subsequent* covenants *unqualified*, it is by no means clear that is an *introduction* of an exception or qualification; it is rather the omission of that which is intended to enlarge the covenant and deprive it of its exceptional and qualified character, and render it according to the common expression "full and unlimited." If the forms of covenants in the Act did not, as in effect they do, except the acts of all other than the covenantor, and were not confined only, as they are, to his acts, &c., and the words "notwithstanding any act of the covenantor" had accordingly been omitted in the Act, then the *insertion* of those words by the conveyancer would have been the introduction of an exception and qualification within the Act; and if this be so, the *omission* of those words cannot be the same thing, and be also an introduction of a qualification. Even though the omission of the words should be within the Act as regards the first covenant, it by no means follows that the effect of such omission would extend to the following covenants, and if not, they would remain qualified (a). The common practice in the profession is to strike out the words "notwithstanding, &c.," under the belief that thereby all the covenants are to be read as in the second column, but unqualified, and without any acts or defaults of any one being excepted. If, however, the above remarks are entitled to any weight, it might be prudent in such cases to give the covenants at full length.

Danger of
varying the
forms.

Effect of striking out the words, "notwithstanding any act," &c.

(a) *Trenchard v. Hoskins*, Winch. 91; 1 Sid. 328; *Browning v. Wright*, 2 B. & P. 18.

Covenants should extend to matters to which the covenantor may have been *party or privy*,

also to defaults.

Imprudent to omit any covenant, as the remedies vary and are not co-extensive.

Damages.

The forms of covenants adopted have received the sanction of the use of centuries, and as their effect is well understood, and they have been illustrated by many cases, it is very unwise to vary from them without necessity. It has been said, however, that in some respects the forms are not sufficiently extensive, and that they should extend to matters to which the covenantor may have been *party or privy*, for that these words are not included within the words "permitted or suffered (a). Therefore where a mere trustee to bar dower (the purchaser taking the fee, subject to his interposed estate) (b), joined with the purchaser in making a mortgage, having previously concurred with him in another conveyance (c), it was of course held that the latter conveyance was a breach of his covenant that he had done no act to encumber the estate, and the Court would not look to the value of his estate or the trust engrafted on it; but it was held that he was not responsible for the concurrence of the purchaser in the same deed, although he had covenanted that he had not permitted or suffered any act whereby any incumbrance was created. The common words that he had not been "*party or privy*," &c., would have given a remedy under the covenant, for of course he was party, and therefore privy to the conveyance, although the purchaser might have conveyed without him. So again the covenants extend only to acts, &c., knowingly or willfully suffered or permitted to the contrary, and not to a default of the covenantor, and the distinction is very material (d).

It is not prudent to omit a covenant, as for instance the covenant for quiet possession or further assurance, under the impression that the covenant for right to convey free from all incumbrances will afford in all cases an adequate remedy. Thus, larger damages may be recovered under the covenant for quiet enjoyment than under that for right

(a) Sug. Vend., 13 ed. 490.

(b) As to the nature of this estate, see the chapter on dower.

(c) Hobson v. Middleton, 6 Bar. and Cres. 295.

(d) Sug. Vend., 13 ed. 490.

to convey (a); under the latter, unless in cases of actual or constructive fraud by the covenantor, defect in title through his default, or the right of some one claiming under him, and the like, no greater damages can be recovered, as a general rule, than the purchase money and interest. So, on the other hand, the remedies on covenant for right to convey are not always supplied by the covenant for quiet possession, as under the latter no cause of action arises till disturbance. Under the covenant for right to convey only nominal damages are recoverable, unless there be proof of actual damage or eviction (b).

(a) *Hodgins v. Hodgins*, 13 C. P. U. C. 146, Richards, J., dissentiente.

(b) *Bannon v. Frank*, 14 C. P. U. C. 295; *Snider v. Snider*, 13 C. P. U. C. 157; *Graham v. Baker*, 10 C. P. U. C. 427.

CON. STAT. CH. 92.

An Act respecting Short Forms of Leases.

Where words of column 1 of the second Schedule are employed, the deed to have the same effect as if the words in column 2 were inserted.

1. When a deed, made according to the forms set forth in the first Schedule to this Act, or any other deed expressed to be made in pursuance of this Act, or referring thereto, contains any of the forms or words contained in column one of the second Schedule hereto annexed, and distinguished by any number therein, such deed shall be taken to have the same effect, and be construed as if it contained the form of words contained in column two of the same Schedule, and distinguished by the same number as is annexed to the form of words used in the deed ; but it shall not be necessary, in any such deed, to insert any such number. 14, 15 V. c. 8, s. 1.

Deeds failing to take effect under this act to be as valid as if this act not made.

2. Any deed or part of a deed, which fails to take effect by virtue of this Act, shall nevertheless be as effectual to bind the parties thereto, so far as the rules of law and equity will permit as if this Act had not been made. 14, 15 V. c. 8, s. 3.

Deed to include all houses, &c.

3. Every such deed, unless an exception be specially made therein, shall be held and construed to include all out-houses buildings, barns, stables, yards, gardens, cellars, ancient and other lights, patha, passages, ways, waters, water-courses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever, to the lands and tenements therein comprised belonging or in any wise appertaining. 14, 15 V. c. 8, s. 2.

THE FIRST SCHEDULE.

This Indenture, made the day of , in the year of Our Lord one thousand eight hundred and in pursuance of the Act respecting short forms of leases between , of the first part, and , of the second part, Witnesseth, that in consideration of the rents, covenants and agreements, hereinafter reserved and contained on the part of the said party (or parties) of the second part, his (or their) executors, administrators and assigns, to be paid, observed, and performed, he (or they) the said party (or parties) of the first part

bath (or have) demised and leased, and by these presents do (or doth) demise and lease unto the said party (or parties) of the second part, his (or their) executors, administrators, and assigns, all that Messuage and Tenement situate, (or all that parcel or tract of land situate) lying and being (*here insert a description of the premises with sufficient certainty*).

To have and to hold the said demised premises for and during the term of _____, to be computed from the day of _____, one thousand eight hundred and _____, and from thenceforth next ensuing and fully to be complete and ended.

Yielding and paying therefor yearly and every day during the said term hereby granted unto the said party (or parties) of the first part, his (or their) executors, administrators, or assigns, the sums of _____, to be payable on the following days and times, that is to say: (on, &c.,) the first of such payments to become due and be made on the _____ day of _____ next.

THE SECOND SCHEDULE.

DIRECTIONS AS TO THE FORMS IN THIS SCHEDULE.

In case of the Leasing of Lands and Tenements.

1. Parties who use any of the forms in the first column of this Schedule, may substitute for the words "lessee" or "lessor" any name or names, and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular in the form in the first column of the Schedule, and corresponding changes shall be taken to be made in the corresponding forms in the second column.

3. Such parties may introduce into or annex to any of the forms in the first column any express exceptions from or express qualification thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.

4. Where the premises demised are of freehold tenure, the covenants 1 to 8 shall be taken to be made with, and the proviso 9 to apply to the heirs and assigns of the lessor; and where the premises demised shall be of leasehold tenure, the covenants and

proviso shall be taken to be made with, and apply to the lessor, his executors, administrators and assigns.

COLUMN ONE.

COLUMN TWO.

1. That the said (*lessee*) covenants with the said (*lessor*) to pay rent.

2. And to pay taxes.

3. And to repair.

4. And to keep up fences.

5. And not to cut down timber.

6. And that the said (*lessor*) may enter and view state of repair, and that the said

1. And the said lessee doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the said lessor that he, the said lessee, his executors, administrators and assigns will, during the said term, pay unto the said lessor the rent hereby reserved, in manner hereinbefore mentioned, without any deduction whatsoever.

2. And also will pay all taxes, rates, duties and assessments whatsoever, whether municipal, parliamentary or otherwise, now charged or hereafter to be charged upon the said demised premises, or upon the said lessor on account thereof.

3. And also will, during the said term, well and sufficiently repair, maintain, amend and keep the said demised premises with the appurtenances, in good and substantial repair, and all fixtures and things thereto belonging, or which at any time during the said term shall be erected and made, when where and so often as need shall be.

4. And also will from time to time, during the said term, keep up the fences and walls of or belonging to the said premises, and make anew any part thereof that may require to be new-made in a good and husbandlike manner, and at proper seasons of the year.

5. And also will not at any time during the said term, hew, fell, cut down or destroy, or cause or knowingly permit or suffer to be hewed, felled, cut down or destroyed, without the consent in writing of the lessor, any timber or timber trees, except for necessary repairs, or firewood, or for the purpose of clearance, as herein set forth.

6. And it is hereby agreed that it shall be lawful for the lessor and his agents, at all reasonable times during the said term, to enter the said demised premises to examine the condition thereof, and further that all want of reparation that upon such view

COLUMN ONE.

(*lessee*) will
repair ac-
cording to
notice.

7. And will
not assign or
sub-let with-
out leave.

8. And that
he will leave
the premises
in good re-
pair.

9. Proviso
for re-entry by
the said (*les-
sor*) on non-
payment of
rent or non-
performance
of covenants.

10. The
said (*lessor*)
covenants
with the said

COLUMN TWO.

shall be found, and for the amendment of which notice in writing shall be left at the premises, the said lessee, his executors, administrators and assigns will, within three calendar months next after such notice, well and sufficiently repair and make good accordingly,

7. And also that the lessee shall not, nor will during the said term, assign, transfer or set over, or otherwise by any act or deed procure the said premises or any of them to be assigned, transferred, set over or sub-let unto any person or persons whomsoever, without the consent in writing of the lessor, his heirs or assigns first had and obtained.

8. And further, the lessee will, at the expiration or other sooner determination of the said term, peaceably surrender and yield up unto the said lessor the said premises hereby demised with the appurtenances, together with all buildings, erections and fixtures thereon in good and substantial repair and condition, reasonable wear and tear and damage by fire only excepted.

9. Provided always, and it is hereby expressly agreed, that if the rent hereby reserved, or any part thereof, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid, although no formal demand shall have been made thereof, or in case of the breach or non-performance of any of the covenants or agreements herein contained on the part of the lessee, his executors, administrators or assigns, then and in either of such cases it shall be lawful for the lessor at any time thereafter, into and upon the said demised premises, or any part thereof, in the name of the whole to re-enter, and the same to have again, repossess and enjoy, as of his or their former estate; any thing hereinafter contained to the contrary notwithstanding.

10. And the lessor doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the lessee, his executors, administrators

COLUMN ONE.

(*lessee*) for
quiet enjoy-
ment.

COLUMN TWO.

and assigns that he and they paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the lessor, his heirs, executors, administrators and assigns, or any other person or persons lawfully claiming by, from or under him, them or any of them.

Imp. St. 8 & 9
V. c. 124.

This Act is taken from the Imperial Act of 8 & 9 Vic., ch. 124. Some of the observations made in regard to the Act respecting short forms of conveyances apply to this Act.

Easements
not legally
appurtenant
will not pass.

As regards easements this Act (sec. 3) is less extensive than the Act as to conveyances, for easements which have been used and enjoyed with the premises are not included, and there may be such which would not pass as belonging or legally appurtenant to the premises (a).

Discrepancy
in covenants
in obligation
to repair in
case of fire.

There is a discrepancy between the third, sixth, and eighth covenants; under the third and sixth, as fire is not excepted, the covenantor would be bound to rebuild; under the covenant to leave in good repair, fire and reasonable wear and tear are excepted.

Covenant to
pay taxes too
extensive.

The covenant as to payment of taxes is perhaps too extensive, and imposes an obligation on the lessee which generally is not intended. Municipal corporations have power to impose assessments for various purposes, as, for instance, for construction of sewers and drainage and local improvements, and under such a covenant as the above the lessee might possibly be made to pay such an assessment (b); a payment which, in short leases at any rate, it is unlikely is ever intended, for the improvement might be permanent in its nature, and the whole expense thereof

(a) *Pheysey v. Vicary*, 16 M. & W. 484; *Barlow v. Rhodes*, 1 C. & M. 439. See a difference of opinion as to the effect of these words, *Langley v. Hammond*, L. R. 3 Ex. 161.

(b) See *Moore v. Hynes*, 22 Q. B. U. C. 107; *Michie v. City of Toronto*, 11 C. P. U. C. 379; *Aldwell v. Hannath*, 7 C. P. U. C.; *Tisdwell v. Whitworth*, L. R. 2 C. P. 326, subsequently referred to in the text; see also *Sweet v. Seager*, 2 C. B. N. S. 119.

payable by twenty or fewer annual instalments, and be of no benefit to the lessee whose lease might be shortly expiring: the annual assessment might be more than the rent.

By the Manchester Improvement Act, 1851, 14 & 15 Vic., ch. 119, the council were empowered to order streets to be sewered and paved by the owners of the adjoining premises, and, in case of default by such owners, to do the work themselves, and to charge the respective owners with their proportionate parts of the expense thereof, to be recoverable by action of debt, &c., and, by way of additional remedy, the council were empowered to require payment from any present or future tenant or occupier, to be levied by distress, and it was made compulsory on the owner to allow such payments to be deducted from the rent. In 1863, premises in G. Street were demised by the plaintiff to the defendant for seven years, at the "clear yearly rent" of £90, the latter covenanting that he would "pay and discharge, all taxes, rates, assessments, and impositions whatever (except property-tax) which during the term should become payable in respect of the demised premises." In 1865, the council gave notice to have G. Street sewered and paved. The plaintiff neglecting to do the required work, the council caused it to be done, and assessed his proportion of the expense at 21*3*l. 3*s*. 6*d*., which he paid; it was held that, the payment having been made by the plaintiff, not for a rate, assessment or imposition which had become payable in respect of the demised premises, but for the breach of a duty imposed on him by the Act of parliament, he was not entitled to call upon the defendant under his covenant to repay him the amount. Bovell, C. J., in giving judgment distinguished as to *Sweet v. Seager*, 2 C. B. N. S. 119, saying, "looking at the language of the covenant in that case, it is almost impossible to conceive how larger words could have been employed. The *reddendum* there was, paying a certain yearly rent, 'without any deduction whatsoever in respect of any taxes, rates, assessments, impositions, or other matter or thing whatsoever then already or thereafter to be taxed, assessed, and imposed upon or in

respect of the said premises, or any part thereof, by authority of parliament, or otherwise howsoever;’ and the covenant, that the tenant should ‘pay, bear, and discharge all such parliamentary, parochial, and county, district, and occasional levies, rates, assessments, taxes, charges, impositions, contributions, burthens, duties, and services whatsoever as during the said term should be taxed, assessed, or imposed upon, or in respect of, the said premises thereby demised, or any part thereof.’ All the Judges, in dealing with the case, refer to the very large and comprehensive language of the covenant. The words, ‘burthens,’ ‘duties,’ and ‘services,’ are especially relied upon. Cockburn, C. J., says: ‘It clearly was the intention of the original landlord, and also of the lessor, that the tenant should bear the landlord harmless against all charges of a general local character imposed upon or in respect of the premises.’ And Creswell, J., lays stress upon the evident intention of the parties that the lessor should receive a certain sum wholly independent of ‘any taxes or assessment of every description or upon any account.’ Regard being had to the language and the general object of the Statute, and to the restricted terms of this covenant, I am clearly of opinion that the payment in question must fall upon the landlord and that the tenant is not liable” (a).

Does the agreement that the lessor may enter and view extend to his representatives and his assigns?

As regards the covenant giving license to enter and view state of repair it reads thus: “it is agreed that it shall be lawful for the lessor and his agents to enter, &c., and the Statute declares that where the premises are of a freehold nature, the covenant shall be taken as made with the heirs and assigns of the lessor, and if of a leasehold nature, with his executors, administrators and assigns. But the covenant, and the power given by, or subject matter of, the covenant, are quite distinct, and it by no means follows that because the lessee covenants with the lessor, his heirs and assigns, that the lessor may enter, that therefore his assigns may: the wide distinction between the parties with whom the covenant is made, and the parties

(a) *Tidswell v. Whitworth*, L. R., 2 C. P. 334.

to whom a power may be given by such covenant, will be more apparent by supposing the case of a covenant with the lessor and his heirs and assigns that some third person might enter, where clearly neither the lessor, his heirs or assigns, could enter. The view that the heirs and assigns of the lessor cannot enter under the covenant given by the Act is also favored by the fact, that as to the agreement and proviso for re-entry on breach of covenants on which the lessor is to have power to re-enter, the Act expressly declares that the proviso and agreement shall apply to the heirs and assigns of the lessor. The only principle under which the benefit of the license can be extended to assigns is, that it appertains to the land, and goes with the reversion, and that as the benefit of covenants as to acts agreed to be done by the lessee directly affecting the land will go to assignees of the lessor, though not named, so also will it be as to acts agreed to be permitted to the lessor to be exercised on the land.

For somewhat the same reasons, the covenant against alienation is defective as not extending to restrain the executors administrators and assigns of the lessee. The only effect of the covenant as it now stands is, that the lessee agrees with the lessor, his heirs and assigns, or executors, administrators and assigns, that he, the lessee, will not assign, &c. (a). It is framed on the supposition that according to Dumpor's case, if once license were given, the benefit of the condition of re-entry on future assignment without leave is gone, the condition being destroyed (b), and therefore that it would be useless to attempt to carry the restraint beyond the lessee. Admitting that on license given before the Act of 29 Vic. ch. 28, the right of re-entry was gone forever, there were still cases under which the estate would pass without license, by act of law, as to personal representatives, to a purchaser under execution, and to assignees in bankruptcy; and it appears that such representatives, or a purchaser under

Covenant not
to assign not
sufficiently
extensive.

(a) Paul v. Nurse, 8 B. & C. 488, per Bailey, J. (b) Ante pp. 5, 6.

execution, and a purchaser from assignees in bankruptcy, would be within the covenant, if it were not confined to the lessee. Again it would seem that mere waiver of a breach would not have destroyed the right of entry on subsequent breach (a). Since the Act of 29 Vic ch. 28, no license thereafter will destroy the right of re-entry, which is preserved for operation on future breaches, and this is an additional reason why the covenant should include personal representatives and assigns. The operation of the covenant as given by this Act, and the effect of waiver and of license, are fully considered in treating of the Stat. 29 Vic. ch. 28, secs. 1, 2 & 3, to which the reader is referred.

(a) Ante pp. 7, 8.

Descent of Freehold Estates of Inheritance (a).

As the Statute of Victoria, which governs descent at the present day, does not apply to estates tail, nor by section 41 to "any limitation of any estate by deed or will, or any estate, which although held in fee simple, or for the life of another, is so held *in trust* for any other person," and as also by section 46, preference on partition and division into shares is given to the person who would have inherited under the former law, it will be requisite to give a brief sketch of that law. It will be found also that for some years to come, and until by possibility of the application of the Statute of Limitations to titles, by which after the prescribed period of possession, a "parliamentary conveyance" (b) is in effect made to the possessors as against the true owners, and the necessity of tracing out old descents superseded, that a knowledge of the former law is absolutely requisite in dealing with real estate. Probably at the present day, as many contested cases of descent are governed by the Statute of William as by that of Victoria, and the former Act cannot possibly be understood without a knowledge of the common law rules, which indeed, were left partially in force by the latter Act.

The Act of Vic. does not extend to estates tail, or estates held in trust, and by s. 46 gives preference to the heir under the old law.

Of the devolution of estates less than freehold it is not proposed to treat, as they now are and have always been subject to laws of descent different from those applicable to freehold estates, they being mere chattel interests and devolving in cases of intestacy, on the personal representa-

(a) In treating of descent at common law, the author has borrowed much from the text of Blackstone. The Statute of William cannot be understood without an appreciation of the common law rules, and the remarks of the learned Commentator on the civil law, and on the rules of computation of consanguinity are of service in considering the present law of descent under the Act of Victoria.

(b) Per Parke, B. Doe d. Jukes v. Sumner, 14 M. & W. 39.

tives. As will however be seen in the sequel, the Statute 14 & 15 Vic. ch. 6, has much lessened the wide distinction theretofore existing as to the descent of the two classes of estates, and assimilated to some extent the descent of freehold estates to that of chattel interests.

1. The various modes of descent according to the various kinds of estates,

The subject may be discussed, 1st. As regards the various *kinds* of freehold estates; inasmuch as each kind is subject under certain circumstances to a different law of descent from the others.

2. And at various periods, viz., at common law; under Stat. 4 Wm. IV. c. 1; under Stat. 14 & 15 Vic. c. 6.

2nd. As regards the *particular time* at which the descent takes place; inasmuch as there are three distinct periods or epochs in each of which descent would be traced in a mode different from the others, viz., that when the common law prevailed; that when the Statute 4 Wm. IV. ch. 1, prevailed; and lastly, that since 14 & 15 Vic. ch. 6.

The various kinds of freeholds.

In respect of the first division of the subject, it may be mentioned that of the various *kinds* of freehold estates, some are not of inheritance; thus tenant in dower, by the curtesy, in tail after possibility of issue extinct, are manifestly determined by the death of the tenant, and so not of inheritance; and in the books estates in fee simple and in fee tail are usually named as the only two freehold estates of inheritance; but for the purposes of this chapter at any rate, it will be requisite to consider a third class, viz., *estates pur autre vie*, as *quasi* estates of inheritance. It is therefore these three classes only of freehold estates that will be treated of, as indeed being the only freehold estates to which the law of inheritance is applicable; and as before mentioned, under certain circumstances, each varies as regards its descent; thus an estate in fee tail, being excluded from the 14 & 15 Vic., is governed by the common law rules of descent, as modified by the 4 Wm. IV., and descends therefore differently from a fee simple; whilst an estate *pur autre vie*, which descended prior to 14 & 15 Vic., sometimes went to the heirs and sometimes under the Statute of Frauds to the executors; and thus varied in its descent from either a fee simple or a fee tail, as will be more fully explained hereafter.

The necessity for the second division of the subject arises from the fact that there are three distinct *periods*, during each of which the law of descent was different from that in the others, as above mentioned, viz : 1. The period from the time when feuds first became hereditary down to the 1st of July, 1834, (the time of the operation of the 4 Wm. IV.), a period during which the common law alone governed. 2. The period from the operation of the 4 Wm. IV., 1st July, 1834, to the 1st January, 1852, when the 14 & 15 Vic. came into effect. 3. The period from 1st January, 1852, since which time primogeniture is abolished, as also the preference of males to females, and of children of the whole blood to those of the half blood, and other important changes made; and the more effectually to supersede the old law, a provision is made that in case of failure of heirs under the rules for ascertaining them given in the Statute, the estate shall go to the next of kin, as under the Statute of Distributions of personal estate.

It will be previously necessary to state, as briefly as possible, the true notion of kindred or alliance of blood, lineal and collateral; and for this purpose, as also for the purpose of illustrating descent at common law, the author adopts the language of Mr. Justice Blackstone in his commentaries on the law.

“Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between John Stiles (the *propositus* in the table of consanguinity) and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between John Stiles and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards; the father of John Stiles is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore

The law varies during three periods.

Of degrees of consanguinity.

Is either lineal or collateral.

Lineal consanguinity.

universally obtains, as well in the civil and canon, as in the common law.

Of collateral
kindred.

Collateral relations agree with the lineal in this, that they descend from the same stock or ancestor, but differ in this, that they do not descend one from the other. Collateral kinsmen are such then as lineally spring from one and the same ancestor, who is the *stirps*, or root, the *stipes* trunk, or common stock, from whence these relations are branched out. As if John Stiles hath two sons, who have each a numerous issue; both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos*.

The method of
computing the
degrees of con-
sanguinity at
common law
which follow-
ed the canon
law.

The method of computing these degrees of consanguinity (*a*) in the canon law, which our (common) law has adopted (*b*), is as follows:—We begin at the common ancestor and reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus *Titius* and his brother are related in the first degree, for from the father to each of them is counted only one; *Titius* and his nephew are related in the second degree, for the nephew is two degrees removed from the common ancestor, viz., his own grandfather, the father of *Titius*. Or (to give a more illustrious instance from our English annals), King Henry the Seventh who slew Richard the Third in the battle of Bosworth, was related to that prince in the fifth degree. Let the *propositus* therefore in the table of consanguinity, represent King Richard the Third, and the class marked (*c*) King Henry the Seventh. Now their common stock or ancestor was King Edward the Third, the *abavus* in the same table; from him to Edmond, Duke of York, the *proavus*, is one degree; to Richard, Earl of Cambridge, the *avus*, two; to

(*a*) See post p. 134.

(*b*) Co. Litt. 23, 24.

Richard, Duke of York, the *pater*, three ; to King Richard the Third, the *propositus*, four ; and from King Edward the Third to John of Gaunt (a) is one degree ; to John Earl of Somerset, (b) two ; to John, Duke of Somerset, (c) three ; to Margaret, Countess of Richmond, (d) four ; to King Henry the Seventh, (e) five ; which last mentioned prince, being the farthest removed from the common stock, gives the denomination to the degree of kindred in the canon and municipal law. Though according to the computation of the civilians, (who count upwards from either of the persons related, to the common stock, and then downwards again to the other, reckoning a degree for each person both ascending and descending,) these two princes were related in the ninth degree ; for from King Richard the Third to Richard, Duke of York, is one degree ; to Richard, Earl of Cambridge, two ; to Edmond, Duke of York, three ; to King Edward the Third, the common ancestor, four ; to John of Gaunt, five ; to John, Earl of Somerset, six ; to John, Duke of Somerset, seven ; to Margaret, Countess of Richmond, eight ; to King Henry the Seventh, nine.”

By the civil law.

The mode of calculating the degrees of proximity in the collateral line, for the purpose of determining what parties are entitled, under the Statute of Distributions, (22 & 23 Car. II, ch. 10,) to shares of the personal estate of an intestate, is not the mode of the canonists adopted by the common law in the descent of real estates ; but with one exception, conforms to that of the civilians (a). The exception is this : according to the civil law, the brother and the grandmother of an intestate stand in equal degrees of affinity to him ; and the grandmother, as being in the lineal ascending line, was by that law preferred to the brother or any other in the collateral line ; but according to the construction put by our courts upon the Statute of Distributions, (in this instance conforming to the canon law), the brother, as making title immediately from his deceased

As to personality same as civil law,

with one exception.

(a) See post p. 134.

brother, is preferred to the grandmother, who could only claim mediately through the father of the deceased.

Descent under St. of Vic. governed by the civil law as regards proximity of relationship.

It will be seen in the sequel that the right of inheritance under the Statute 14 & 15 Vic. is with reference to proximity of relationship, more in accordance with the civil than the canon law mode of computation.

The above will be plainer by examination of the table of consanguinity annexed, wherein all the degrees of collateral kindred to the *propositus* are computed, so far as the tenth of the civilians and the seventh of the canonists inclusive, the former being distinguished by the numeral letters, the latter by the common cyphers.

DESCENT AT COMMON LAW.

I. Estates shall lineally descend to the issue of the person last seized, but never lineally ascend.

1. The first rule is; that *inheritances shall lineally descend* to the issue of the person who last died actually seized, *in infinitum*; but shall *never lineally ascend*.

The ancestor must have had actual seisin.

Under the Statutes of William (s. 18), and Victoria (ss. 27, 28), lineal ancestors are admitted to the inheritance immediately after failure of lineal descendants; but under the latter Act the privilege is confined to the immediate ancestors; and the common law rule as to necessity of actual seisin is abolished, (ss. 4, 8, 14, 23).

No person at common law can be properly such an ancestor, as that an inheritance of lands or tenements can be derived from him unless he hath had *actual seisin* (*a*)

Actual seisin distinguished from seisin in law.

(*a*) What constitutes *actual seisin*, or possession in deed, as distinguished from *seisin in law*, or constructive possession, is a question of importance, not merely as regards tracing descent at common law, but also respect of qualification as tenant by the curtesy and in trespass.

Notwithstanding s. 8 of Con. Stat., c. 82, dispensing with proof of entry by the heir in order to prove title in him, or any one claiming by through him, (a provision which, as observed in treating of that section is unnecessary as regards descent under the Stat. of Wm.), actual entry or what is equivalent thereto as explained in the text, is still requisite to constitute actual seisin so as to enable the husband of the heiress to take as tenant by the curtesy; *Wigle v. Merrick*, 8 C. P. U. C. 307, per *Hagarty, J.* and per *Draper, C. J.*, 318, 319; 1 Inst., 29a. Under the like circumstances of want of actual seisin, the heir was not at common law a good stock of descent as explained in the above and following pages.

such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of the freehold, or unless he hath had

The case of a conveyance under which the grantor took back the estate to himself or his heirs, and the manner in which the Statute of William affected the common law rules in such cases, is treated of in the text, pp. 128, 152, 153.

In cases other than those of descent there would seem to be some difficulty in determining to what extent a person is to be deemed in possession, for various purposes, as to qualify the husband to take by the curtesy, or to enable such person to maintain trespass, when the conveyance operates under the Statute of Uses. Thus, would the wife be considered as having been actually seised, or in actual possession (mere seisin in law, or constructive possession, of course not being sufficient) so as to enable her husband to take as tenant by the curtesy? 1st, where she took by way of bargain and sale, the bargainor never having been in possession—2nd, where the grantor was or was not in possession, and he conveyed to the feme by statutory grant, or common law conveyance, to a grantee to use, she taking as cestui qui use.

The question is, whether in the above cases the Statute of Uses confers a possession equivalent to actual seisin, or actual possession, within the rule requiring such in the case of a claimant by the curtesy.

Whatever may be the case where the bargainor has had actual possession, still as regards the cases above mentioned, the author submits the following, as reasons why in neither case the husband can take by the curtesy, in other words, why the wife is not to be deemed to have had actual seisin in deed. He does this with great diffidence, because a recent case would seem to shew that in either case there would be actual seisin, if once an analogy be established of seisin of a rent charge, and of a corporeal hereditament by force of the St. of Uses.

In that case (*Heelis v. Blain*, 18 C. B. N. S. 90, 11 Jur. N. S. 18), the question was whether a cestui qui use, one of the sons of S. Heelis, was entitled to vote under the Reform Act, 2 Wm. 4, c. 45, as having been "in the actual possession of" a share in a rent-charge for six months prior to 31st July, 1864. The rent-charge was originally created by deeds of lease and release, and was thereafter conveyed to S. Heelis in fee. S. Heelis had granted the same to J. H., and his heirs to the use of the five sons of him S. Heelis, in fee as tenants in common. The first rent paid to the cestuis qui use was in July. It was objected that the cestuis qui use had not had "actual possession" for six months prior to July, and so were not entitled to vote.

It was conceded that apart from the effect of the Statute of Uses, no actual seisin in deed or possession could be considered as had by the common law by the cestuis qui use till receipt of the rent; but the Court held that that Statute gave "the cestui qui use possession immediately on the execution of the deed creating the use," and that "the Legislature intended the same meaning to the word *possession* in the Statute of Uses, as it did to the words *actual possession* in the Reform Act."

The language of the Statute of Uses is, that the person who has the "use shall from thenceforth stand and be seized, deemed and adjudged in lawful seisin, estate, and possession of and in the same lands, rents, &c., to all intents, constructions and purposes in the law, of, and in such like estates as they had or shall have in the use, trust or confidence

What is equivalent to corporal seisin in hereditaments that are incorporeal, such as the receipt of rent, a presentation to the church in case of an advowson, and the like. And

of, or in the same, and that the *estate, title, right and possession* *was in such person or persons, that were, or hereafter shall be seised* of any lands, tenements, or hereditaments to the use, confidence or trust of any such person or persons, or of any body politic, *be from thenceforward clearly deemed and adjudged to be in him or them that have, hereafter shall have such use, confidence or trust after such quality, manner, form and condition as they had before, in, or to the use, confidence or trust that was in them.*"

Considering the language of the Statute it is difficult to understand how if the person seised to the use has not the actual possession or seisin in deed, but merely constructive possession, or seisin in law, the cestui qui use can take any more, or greater "estate, title, right or possession." It is old and well known law that the seisin of grantee to uses must be commensurate with, and sufficient to serve the uses declared. Thus, a common law conveyance to A to the use of B and his heirs, B can take no fee, but a mere estate pur autre vie for want of seisin in fee in A to serve the use. So also it must follow that if A takes no actual seisin in deed, B can take none.

In the principal case John Heelis, the grantee to uses, never had actual seisin, or actual possession, therefore there was none such that could be "deemed and adjudged to be in him or them" that had the use. See the language of the Act, p. 90, in the text.

Conceding at present that on a conveyance of a corporeal hereditament by way of bargain and sale, or covenant to stand seised, "the possession that was in such person" shall be "deemed and adjudged to be in him" who has the use, viz, the bargainee or covenantee, so as to invest him with the actual seisin or possession of the bargainor, or covenantor, by force of the Statute, still in the principal case the Statute does not apply at all in favor of John the grantee to uses, for the conveyance was by way of grant, operating at common law only, and he therefore had at most mere seisin in law. It is clear that on a common law conveyance as a grant of a rent charge, or a release in fee of land to one who has a vested estate, but no possession, as also on a conveyance of the immediate freehold in land by way of Statutory grant under Con. Stat. 90, no actual seisin in deed or possession, by mere force of the conveyance only, vests in the grantee or releasee; and in case of a grant it would make no difference that the grantor was in possession at the time of grant; none of these cases will the grantee or releasee by virtue only of the conveyance, and without entry, or some act equivalent to seisin entry, be invested with more than constructive possession, or seisin in law. See the authorities given hereafter.

In *Heelis v. Blain*, the distinction was not adverted to between a conveyance operating, by way of bargain and sale, or covenant to stand seised, on the seisin of the bargainor or covenantor, so as to draw out of him a vest in the bargainee or covenantee the possession of the former by force of the Statute, and between a conveyance operating at common law, vesting in the grantee no actual seisin or possession, and consequently none that can be "deemed and adjudged to be in him" that has the use; and the cases referred to do not appear to controvert this distinction, or establish more than that as to which the Statute is clear and p

therefore all the cases governed by the common law rules* are upon the supposition that the deceased (whose inheritance is claimed) was the last person actually seised thereof."

cise, viz, that "the estate, title, right and possession" whatever it may be, of the person seised to uses shall be "adjudged to be in him" who has the use. The cases do not shew what was virtually held in *Heelis v. Blain*, that a cestui qui use can take a possession exceeding in quality that of his grantee to uses, though they may indicate that the estate and actual possession of one seised to an use may be executed by the Act so as to invest his cestui qui use with the same actual possession, as in the case of a bargain and sale, or covenant to stand seised.

This latter proposition even has been denied on principles and reasoning apparently incontrovertible. The following remarks of two very eminent real property lawyers are to the purpose: Mr. Preston (on Conv. vol. 2, p. 390) in treating of the conveyance by way of lease and release, alludes to the lease taking effect not at common law, but (as usual on this mode of conveyance) under the Statute of Uses as a bargain and sale for a year, and he gives the following ordinary language of such a lease, and his remarks thereon, thus: "To the intent, that by virtue, &c., the said A. B. and C. D. may be in the actual possession of the premises, and be thereby enabled to accept a grant and release, &c. (as before), to the uses, upon the trusts, and for the intents and purposes to be declared by an indenture already prepared, and intended to bear date, &c., and to be made, &c."

"This clause calls for one observation, it follows the language of practice, in assuming the object to be, to put the lessee in the actual possession. This expression, and the practice on which it is grounded, must be understood as a reference to the operation of the Statute for transferring uses into possession. By possession, is meant only estate.

"The lease for a year, or bargain and sale, cannot, by its own operation, give to the lessee or bargainee the actual possession. It accomplishes nothing more than to give him an actual estate. * * * Though the bargain and sale may be by a person who has the possession, the possession will not be changed without an entry by the lessee or bargainee, even when the bargain and sale is to be from a day which is past, or henceforth, &c. At the common law the lessee had not any estate till entry: under the bargain and sale he has an estate immediately on the execution of the bargain and sale, and before entry, provided the bargain and sale is to hold from a day past, or from the execution. But the bargainee cannot maintain an action of trespass, or be considered as in the actual possession of the land, until he has entered by virtue of the bargain and sale.

"With every disposition to encourage an observance of established forms, it is to be lamented that any expression should have been adopted for this or any other instrument, which might lead the student to an inaccurate conception of the true meaning of the expressions which are used. Some other expression, showing that the lessee was to have an *actual vested estate*, as contradistinguished from an actual possession, would have more adequately described the object of the lease for a year, and possibly might have been a protection against those errors into which not only students, but even men of extensive knowledge in the profession, who have undertaken to write on the subject of this assurance, have been led:—how just is the maxim, *ignoratis terminis, ignoratur et ars*, and the other maxim, *nomina si perdas certe distinctio rerum perditur*."

As to taking
by purchase.

It is necessary here, however, to call attention to the case of the ancestor taking *by purchase (a)* without ac-

Mr. Hayes (Vol. 1, 5 ed., p. 78,) follows, and approves of the law as given above by Mr. Preston, he says. "When the lessee was said to be in the *actual possession* under the bargain and sale for a year, it was meant only that he acquired, by the mere execution of the instrument, such an *estate* in the land as rendered him capable of accepting a release of the remainder or reversion.

"Even where the bargain and sale was made by the immediate freeholder, the bargainee was not, by force of the Statute, invested with the actual possession *in fact* of the land, nor could he maintain trespass till he had entered. By *actual possession*, therefore, we are to understand such an estate in the land as admitted of enlargement by way of release; and, generally, by the term *possession*, when that term is employed in treating of uses as they were affected by the Statute, nothing more is to be understood than that the Statute annexed to the use a commensurate legal interest."

Authorities.

The authorities bear out the views of the learned writers above mentioned, and some of them go the length of shewing that the cestui qui use before entry cannot even maintain trespass. Some of these cases also shew the effect of constructive possession, or seisin in law; per Bridgman, C. J. Carter, 66; Barker v. Keate, 2 Mod. 249; Ford's case, 11 Rep. 41; Plowd., 301; Noy., 73; Lutwich v. Mitton, Cro. Jac. 604; Com. Dig. Trespass B, 3; Perry v. Bowes, 1 Vent, 360, doubtful; Turner v. Cameron's Co., 5 Ex. 932; Litchfield v. Ready, 5 Ex. 939; Barnett v. Earl Guilford, 11 Ex. 19; Bullen & Leake, Prac. Plg., 3 Ed. 417; Saunders on Uses, Vol. 2, p. 45; Wigle v. Merrick, 8 C. P. U. C., 332, per Hagarty, J.; Doe Cuthberston v. McGillis, 2 C. P. U. C., 147; Mahar et ux. v. Fraser, 17 C. P. U. C., 408: see, however, Orser v. Vernon, 14 C. P. U. C., 587; Ball v. Young, 8 C. P. U. C., 231; as to cases of vacant possession see per Sullivan, J., in Doe d. Cuthbertson v. McGillis, 2 C. P. U. C., 147.

Result.

The result would appear to be that on a conveyance operating to pass the estate at common law, as on a grant from the Crown, or release, or a statutory grant under Con. St. c. 90, which passes the immediate freehold without aid of the St. of Uses, the grantee or releasee till entry, or its equivalent, has but seisin in law or constructive possession, and consequently if uses are declared on the seisin of the grantee or releasee, the cestui qui use can take no more. That on a bargain and sale, or covenant to stand seised, where the bargainor or covenantor never had actual possession, the bargainee or covenantee will not by mere force of the conveyance, without entry, or its equivalent, be considered as taking more than constructive possession, or seisin in law, not sufficient to qualify the husband to take as tenant by the curtesy: whilst as regards the right to maintain trespass the authorities conflict. As to cases of conveyance by a bargainor or covenantor who had actual possession, the authorities, considering Heelis v. Blain and the cases there referred to, also conflict as regards the question whether the bargainee or covenantee is to be considered as taking the actual possession of the party conveying. As regards the heir, entry would still seem to be requisite to give more than seisin in law.

(a) As to taking by purchase, and the alterations made in the common law sense thereof by the Acts of Wm. & Victoria, see pp. 143, 151; see also Blackstone's Com. by Leith, p. 175.

quiring actual seisin, in which case he would still be a good stock of descent. At common law, strictly speaking, there could be no such case as acquisition by purchase of an immediate freehold without acquisition of seisin; for the usual conveyance by feoffment was only perfect by livery of seisin, and if the conveyance were by release it required possession in the releasee. At common law, therefore, the purchaser of an immediate estate of freehold being always seised, the canon as above expressed, that descent was to be traced from the person last seised, required no modification as regarded purchasers. But when after the first canon was established, conveyances by devise under the Statute of Wills, and by way of use under the Statute of Uses were allowed in modes unknown to the common law, transferring the estate without livery or actual seisin, then the canon required, and is to be considered, to be modified, to meet the cases of purchasers taking by devise or by way of use without acquiring actual seisin. Otherwise by strict literal application of the above canon, the devisee or *cestui qui use*, who never entered, would not be a good stock of descent; for as before shewn (a) the possession acquired by mere force of the Statute of Uses is but a constructive possession, and gives no actual seisin as distinguished from seisin in law. The author apprehends, on the authorities before referred to (b), that the true rule where the ancestor took under a conveyance to uses is, not that he thereby acquired actual seisin, but that as he took as purchaser, he was a good stock of descent, on the principle before referred to. That this is so, is shewn by the fact that a devisee need not enter or acquire actual seisin to enable his heir to derive title from him, and the decisions are on the ground that he takes as purchaser (c); in such case there could be no aid by the Statute of Uses as to possession. For the same reason the *cestui qui use* taking as purchaser, need not acquire actual seisin. In case the ancestor takes by purchase, he may be capable of transmitting the property

(a) See note, p. 120, as to actual seisin.

(b) *Supra* p. 120, n. a.

(c) *Doe d. Parker v. Thomas*, 3 M. & G. 815.

so taken to his own heirs, without an actual possession in himself (a).

"The seisin therefore of any person, thus understood, makes him the root or stock, from which all future inheritance by right of blood must be derived; which is briefly expressed in this maxim, *seisina facit stipitem*."

When therefore a person dies so seised, the inheritance first goes to his issue: as, if there be Geoffrey, John and Matthew, grandfather, father and son; and John purchases lands, and dies; his son Matthew shall succeed him as heir, and not the grandfather Geoffrey, to whom the land shall never ascend, but shall rather escheat to the lord." And thus if a man died seised in fee, leaving no issue or brothers or sisters, but leaving his father and an uncle, the brother of his father, the uncle took; the father being prohibited from taking, as his doing so would have been a lineal ascension, he was passed by, and gave place to the collateral and more distant relative, the uncle; but upon the death without issue of the uncle, (he having acquired actual seisin), the estate then vested in the father; he thus taking as heir, not to his son, but to his brother, the uncle of the original purchaser.

Instances of
difference be-
tween tracing
from person
last seised and
last entitled.

It may be well to illustrate the distinction between tracing from the person *last seised*, and from the person *last entitled* (b). The difference was sometimes important; and it will be seen in the case put below, if the person last entitled did not acquire seisin, the inheritance sometimes descended to a person different from him, who would have taken if seisin had been acquired. Thus, if (see 1st Table of Descents) Geoffrey had been the person last seised, and died intestate, and his sons, John, Francis, and Oliver, on his death, become successively entitled, as issue by the first wife, and died without becoming seised, and without issue; here the son of Geoffrey by the second wife, of the half blood to Oliver the person last entitled, would have taken as next heir to Geoffrey, the person last seised, in preference to Bridget and Alice, the sisters of the whole blood of the person last entitled. For

(a) Watk. Desc., p. 32.

(b) See also post p. 146.

descent has to be traced from Geoffrey as last seised, not from Oliver as last entitled; and by force of the 2nd rule, the son of Geoffrey shall be preferred to his daughters: but if either John, Francis, or Oliver had obtained seisin, then descent must have been traced from him who was last seised; and his sisters of his whole blood would have taken in preference to his brother of the half blood. Indeed, as afterwards explained, in such case the half-brother, under no circumstances could ever have taken, and if other heirs were wanting, the estate would escheat.

In the case of a remainder or reversion in fee, subject to and preceded by a *life* estate, as the seisin was in the tenant of the freehold, and not in the remainder-man or reversioner, it followed that on death of such remainder-man or reversioner, and consequent descent of his estate to his heir, the party claiming the estate on death of such heir pending the life estate, could not take such intermediate heir as the stock of descent, as such heir never acquired seisin; but the *stirps* would have been, in case of a remainder, the *purchaser* of such estate or, in other words, the person to whom it was first granted; and in case of a reversion, the person by whom it was first created by grant of the particular estate preceding it (*a*). But if the reversion or remainder were not dependent on an estate of freehold, but for years, here the possession of the tenant being that of the remainder-man or reversioner, and the interest of both but one estate in law, the intermediate heir would be considered as having acquired actual seisin by the possession of his tenant for years, and so would constitute a new stock, from whom descent would be traced, instead of from his ancestor, and the rule would be the same even though the particular estate were for life, if the intermediate heir in remainder or reversion, in his lifetime exercised acts of ownership over his estate, as by making a lease for life, or by conveying to another in fee to the the use of the grantor and his heirs. Any such act of ownership was deemed equivalent to acquiring seisin (and in fact was such, as nearly as the nature

In cases of descent of remainder or reversion dependent on life estate,

descent to be traced from purchaser,

unless the ancestor had exercised acts of ownership.

(a) Hayes Conv. vol. 1, 3^d ed. p. 313.

Instance of
difference as
to persons who
would take.

of the case would admit of), and constituted the agent a new stock of descent, as seised within the scope of this first canon. The case put above shows the importance of these acts, and the acquisition of seisin thereby, and that, according as it was or was not acquired by the intermediate heir, would his brother of the half blood take or be rejected as his heir. When it is said the acts of ownership above instanced would constitute the agent a new stock of descent, the remark must be understood as confined expressly to the operation of the first canon; that is, he will be considered as having become *seised* for all purposes of application of that canon, but he will not be considered as having become a *purchaser* within the meaning of the 5th and 7th canons, hereafter referred to. For (as subsequently explained in considering ss. 5 & 6 of the Consolidated Statute of William, which alter the common-law doctrine) (a) a mere conveyance to uses whereby the estate revested, as before, in the conveying party and his heirs, was wholly nugatory at common law, so far as regarded the making such party and his *right heirs* take by *purchase*: the right heirs at common law would be deemed as in, of their old or former estate. Thus if in the table of descent at common law, Lucy Baker being seised at fee, had demised for life, leaving a reversion in herself in fee, which descends on her death to her eldest son John by her first husband, and after, on his dying without issue, to his brother Francis, and after, on his dying without issue, to his brother Oliver; now if Oliver being so entitled, should, by conveyance to uses, convey to another in fee, to the use of himself and his heirs; although the effect would be, as above stated, to constitute a *seisin* in him, so as to cause him to be a new stock of descent, and thus admit as next heirs, on his death without issue, his sisters of the whole blood, Bridget and Alice, in preference to his half-brother, son of Lucy by her second husband, still the effect of the conveyance would not be to constitute Oliver or his right heirs Bridget, and Alice, *purchasers*, and so, on the death of Alice and Bridget, and the next

(a) Post p. 152.

taker, their half-brother, son of Lucy, without issue, the reversion would go by the 5th and 7th canons, to the collateral heir of Lucy the mother No. 14, instead of to that of the father Geoffrey No. 7. Whereas if, by the conveyance, Oliver or his sisters were to be considered as taking as *purchasers*, then under the above state of facts, all consideration of descent to them was out of the question, and on their death without issue the reversion would have gone, by the 5th and 7th canons, to their next collateral heir on the *paternal* side. If Oliver instead of conveying to uses, as above supposed, had conveyed so as to vest the fee absolutely in a stranger, and then have taken a reconveyance of the fee, this would have constituted him a *purchaser*. In all that has been said it is presupposed of course that the estate descended is throughout strictly a reversion, *i. e.*, that the life estate is existing during the supposed devolutions of the estate, for otherwise it would be an estate in possession.

II. "The *second* rule was that the *male issue should be admitted before the female*." This rule was so simple in its application as to require no comment. It may be illustrated by a single example: A dying, left two sons and two daughters: by force of a rule which we have not yet reached in its order, the eldest son would first have taken; and upon his death without issue, his heir would have been his brother, to the exclusion of his sisters, although the latter may have been older in years than both the brothers.

The true reason, says Blackstone, "of preferring the males must be deduced from feodal principles; for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud, inasmuch as they were incapable of performing those military services for the sake of which that system was established. But our [common] law does not extend to a total exclusion of females, as the Salic law and others, where feuds were most strictly retained: it only postpones them to males; for though daughters are excluded by sons, yet they succeed before any collateral relations."

This canon of
no force under
St. of Wm.

3rd canon :
primogeniture
among males ;
equality
among
females.

This Canon
abolished un-
der St. of Vic.

4th canon :
lineal de-
scendants in
infinitum rep-
resent the an-
cestor.

Descent per
stirpes.

This canon is not varied, though explained by the St. of William (Con. Stat., s. 19), but is entirely disregarded by the Stat. of Victoria.

III. "The *third* rule was, that when there were two or more males in equal degree, the eldest only should inherit, but the females altogether." It was upon this canon that the law of primogeniture depended, the eldest son taking, to the total exclusion of his brothers and sisters. The latter part of the rule excluded primogeniture among females, and gave the estate among them altogether, as coparceners.

The Stat. of William did not vary this canon, but by the act of Victoria primogeniture among males was abolished and equal distribution which theretofore prevailed as to females only was applied to males and females indiscriminately.

IV. "A *fourth* rule, or canon of descents, is this : that the lineal descendants, in infinitum, of any person deceased shall represent their ancestor ; that is, shall stand in the same place as the person himself would have done had he been living."

"Thus, the child, grandchild, or great-grandchild, either male or female, of the eldest son, succeeds before the younger son, and so in infinitum. And these representatives shall take neither more nor less, but just so much as their principals would have done. As if there be two sisters, Margaret and Charlotte ; and Margaret dies, leaving six daughters ; and then John Stiles, the father of the two sisters dies, without other issue ; these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living ; that is, a moiety of the lands of John Stiles in coparcenary ; so that upon partition made, if the land be divided into twelve parts, thereof Charlotte, the surviving sister shall have six, and her six nieces, the daughters of Margaret, one a piece."

"This taking by representation is called succession per stirpes, according to the roots ; since all the branches inherit the same share as their root, whom they represent would have done. And in this manner also was the Jewish

succession directed; but the Roman (which our present Statute of Victoria more resembles, and exactly so in the following instances) somewhat differed from it. In the descending line, the right of representation continued *in infinitum*, and the inheritance still descended *in stirpes*: as, if one of three daughters died leaving ten children, and then the father died, the two surviving daughters had each one-third of his effects, and the ten grandchildren had the remaining third divided between them. And so among collaterals, if any person of equal degree with the persons represented were still subsisting (as if the deceased left one brother, and two nephews, the sons of another brother), the succession was still guided by the roots; but if both the brethren were dead leaving issue, then their representatives in equal degree became themselves principals, and shared the inheritance *per capita*, that is share and share alike; they being themselves now the next in degree to the ancestor, in their own right, and by right of representation. So, if the next heirs of Titius be six nieces, three by one sister, two by another, and one by a third; his inheritance by the Roman law, was divided into six parts, and one given to each of the nieces; whereas the common law of England in this case would still divide it only into three parts, and distribute it *per stirpes*, thus: one third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother."

The Statute of William did not interfere with the fourth canon, but it will be seen hereafter that the above common law doctrine of descent *per stirpes* is broken in upon by the Statute of Victoria, and the principle of the Roman law, above mentioned, is adopted; and descent *per stirpes* or *per capita* takes place according as the heirs are in equal or unequal degrees of consanguinity.

V. "A fifth rule is, that on failure of lineal descendants, V. On failure of lineal descendants of the person last seized, the inheritance shall descend to his collateral relations, being of the blood of the person last seized, inheritance descends first purchaser; subject to the three preceding rules."

to collateral
relatives, of
blood of first
purchaser.

Thus, if Geoffrey Stiles purchases land, and it descends to John Stiles, his son, and John dies seised thereof without issue; whoever succeeds to this inheritance must be of the blood of Geoffrey the first purchasor of this family."

Who is a pur-
chaser at
Com. Law?

The first purchasor, *perquisitor*, is, at common law, he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift, or by any other method, except only that of descent (a). Under the Statute of William (Con. St. ss. 4, 5, 6, and 14,) the sense of taking by purchase is extended; and varied also by the Act of Victoria (Con. St., s. 52.) The Statute of William also varies this canon in permitting the lineal ancestor to take and that in preference to collaterals, as is explained in the sequel.

under Stats.
of Wm. & Vic.

"When feuds first began to be hereditary, it was made a necessary qualification of the heir, who would succeed to a feud, that he should be of the blood of, that is, lineally descended from, the first feudatory or purchasor. In consequence whereof if a vassal died seised of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring; not even to his brother, because he was not descended, nor derived his blood, from the first acquirer. The true feudal reason for which rule was this, that what was given to a man, for his personal service and personal merit, ought not to descend to any but the heirs of his person. But if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then his brother or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance."

Feudum novum
ut antiquum.

"However in process of time, when the feudal rigour was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum*; that is, with all the qualities annexed of a feud derived from his ancestors; and then the collateral relations were admitted to succeed even *in infinitum*, because they might have

(a) See pp. 124, 143, 151.

been of the blood of, that is descended from, the first imaginary purchaser : and all grants in fee of an indefinite character were deemed to be of that tenure^(a), and therefore collateral kindred of the grantee, or descendants from any of his lineal ancestors admitted, unless in the case of a fee-tail, and there this rule is still strictly observed, and none but the lineal descendants of the first donee (or purchaser) are admitted."

"Yet at common law, when an estate really descended in a course of inheritance to the person last seised, the strict rule of the feudal law was observed; and none admitted, but the heirs of those through whom the inheritance had passed; for all others had demonstrably none of the blood of the first purchaser in them, and therefore should never succeed. As if lands came to John Stiles by descent from his mother, Lucy Baker, no relation of his father (as such) could ever be his heir of these lands; and, *vice versa*, if they descended from his father Geoffrey Stiles, no relation of his mother (as such) could ever be admitted thereto; for his father's kindred had none of his mother's blood, nor had his mother's relations any share of his father's blood. And so, if the estate descended from his father's father, George Stiles, the relations of his father's mother, Cecelia Kempe, could for the same reason never be admitted, but only those of his father's father."

When an estate descended to the person last seised the strict rule of the feudal law observed.

"Here we may observe, that so far as the feud is really *antiquum*, the common law traces it back and will not suffer any to inherit but the blood of those ancestors, from whom the feud was conveyed to the late proprietor. But when, through length of time it can trace it no farther; as if it be not known whether his grandfather, George Stiles, inherited it from his father, Walter Stiles, or his mother, Christian Smith; or if it appear that his grandfather was the first grantee, and so took it (by the general law) as a feud of indefinite antiquity; in either of these cases, the common law admits the descendants of any ancestor of

Where the feud is really *antiquum*, none inherit but blood of ancestors from whom it was conveyed to late proprietor.

(a) See also Imp. St. 31, Geo. 3, c. 31, s. 43, Con. Stats. Canada.

George Stiles, either paternal or maternal, to be in their due order the heirs to John Stiles of this estate; because in the first case it is really uncertain, and in the second case, it is supposed to be uncertain, whether the grandfather derived his title from the part of his father or his mother."

"This then is the great and general principle upon which the common law of collateral inheritances depends; that upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or that it shall result back to the heirs of the body of that ancestor from whom it either really has, or is supposed by a fiction of law to have originally descended."

"The rules of inheritance that remain are only rules of evidence, calculated to investigate who the purchasing ancestor was; which *in feudis vere antiquis* has in process of time been forgotten, and is supposed so to be in feudis that are held *ut antiquis*."

VI. Collateral heir of person last seised must be next collateral kinsman, of whole blood.

This rule varied by the acts of Wm. and Vic.

The canonical degrees of proximity.

VI. "A sixth rule or canon therefore is, that *the collateral heir of the person last seised must be his next collateral kinsman, of the whole blood.*"

It will be shewn hereafter that the common law infirmity of the half blood was partially removed by the Statute of William, who, under sec. 21, take after the whole blood in the same degree, and was almost entirely removed by the Act of Victoria, under which, by sec. 36, except in certain cases, they are placed on the same footing as the whole blood.

"First, under this common law canon, the heir must be next collateral kinsman, either personally or *jure representationis*; which proximity is reckoned according to the canonical degrees of consanguinity before mentioned. Therefore the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who is only in the second. And herein consists the true reason of the different methods of computing the degrees of consanguinity (*b*), in the civil law (to which descent by the Statute

of Victoria is most allied) on the one hand, and in the canon and common laws on the other. The civil law regards consanguinity principally with respect to successions, and therein very naturally considers only the person deceased, to whom the relation is claimed : it therefore counts the degrees of kindred according to the number of persons through whom the claim must be derived from him : and makes not only his great nephew but also his first cousin to be both related to him in the fourth degree ; because there are three persons between him and each of them. The canon law regards consanguinity principally with a view to prevent incestuous marriages between those who have a large portion of the same blood running in their respective veins ; and therefore looks up to the author of that blood, or the common ancestor, reckoning the degrees from him : so that the great nephew is related in the third canonical degree to the person proposed, and the first-cousin in the second ; the former being distant three degrees from the common ancestor (the father of the *propositus*), and therefore deriving only one-fourth of his blood from the same fountain ; the latter, and also the *propositus* himself, being each of them distant only two degrees from the common ancestor (the grandfather of each), and therefore having one half of each of their bloods the same. The common law regards consanguinity principally with respect to descents ; and, having therein the same object in view as the civil, it may seem as if it ought to proceed according to the civil computation. But, as it also respects the purchasing ancestor, from whom the estate was derived, it therein resembles the canon law, and therefore counts its degrees in the same manner. Indeed, the designation of person (in seeking for the next of kin), will come to exactly the same end, (though the degrees will be differently numbered), whichever method of computation we suppose the common law to use ; since the right of representation of the parent by the issue is allowed to prevail *in infinitum*. This allowance was absolutely necessary, else there would have frequently been many claimants in

exactly the same degree of kindred ; as, for instance, uncles and nephews of the deceased ; which multiplicity, though no material inconvenience in the Roman law of partible inheritances, yet would have been productive of endless confusion where the right of sole succession, as with us, was established. The issue or descendants therefore of John Stile's brother are all of them in the first degree of kindred with respect to inheritances, those of his uncle in the second, and those of his great uncle in the third ; and their respective ancestors, if living, would have been ; and are severally called to the succession in right of such their representative proximity."

On failure of issue of person last seized, inheritance descends to issue of next immediate ancestor. "The right of representation being thus established, the former part of the present rule amounts to this : that on failure of issue of the person last seized, the inheritance shall descend to the other subsisting issue of his next immediate ancestor. Thus, if John Stiles dies without issue, his estate shall descend to Francis his brother, or his representatives ; he being lineally descended from Geoffrey Stiles, John's next immediate ancestor, or father. On failure of brethren or sisters, and their issue, it shall descend to the uncle of John Stiles, the lineal descendant of his grandfather George, and so on *in infinitum*."

Lineal ancestors, though incapable of inheritance, are yet the common stock from which the next ancestor must spring. "Now here it must be observed that the lineal ancestors though (according to the first rule,) incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring. But, though the common ancestor be thus the root of the inheritance, yet it is not necessary to name him in making out the pedigree of descent. For the descent between two brothers is held to be an *immediate* descent, and therefore title may be made by one brother or his representatives *to* or *through* another without mentioning their common father (a) ; if Geoffrey Stiles hath two sons, John and Francis, Francis may claim as heir to John without naming their father Geoffrey ; and

(a) This rule is varied by sec. 17 of the Con. St.

so the son of Francis may claim as cousin and heir to Matthew the son of John, without naming the grandfather, viz as son of Francis, who was the brother of John, who was the father of Matthew. But though the common ancestors are not named in deducing the pedigree, yet the law still respects them as the fountains of inheritable blood; and therefore, in order to ascertain the collateral heir of John Stiles, it is first necessary to recur to his ancestors in the first degree; and if they have left any other issue besides John, that issue will be his heir. On default of such, we must ascend one step higher, to the ancestors in the second degree, and so upwards, *in infinitum*, till some couple of ancestors be found who have other issue descending from them besides the deceased, in a parallel or collateral line. From these ancestors the heir of John Stiles must derive his descent, and in such derivation the same rules must be observed with regard to sex, primogeniture, and representation, that have before been laid down with regard to lineal descents from the person of the last proprietor."

"But secondly, the heir need not be the nearest kinsman absolutely, but only *sub modo*; that is, he must be the nearest kinsman of the *whole* blood; for if there be a much nearer kinsman of the *half* blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded."

Heir must be nearest kinsman of whole blood.

"A kinsman of the *whole blood* is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For as every man's own blood is compounded of the bloods of his respective ancestors, he only is properly of the whole or entire blood with another, who hath, so far as the distance of degrees will permit, all the same ingredients in the composition of his blood that the other hath. Thus the blood of John Stiles being composed of those of Geoffrey Stiles his father, and Lucy Baker his mother, therefore his brother Francis, being descended from both the same parents, hath entirely the same blood with John Stiles; or he is his brother of the whole blood. But if

Half-blood can
not inherit to
each other.

after the death of Geoffrey, Lucy Baker the mother marries a second husband, Lewis Gay, and hath issue by him, the blood of this issue, being compounded of the blood of Lucy Baker, (it is true,) on the one part, but that of Lewis Gay, (instead of Geoffrey Stiles,) on the other part, it hath therefore only half the same ingredients with that of John Stiles; so that he is only his brother of the half blood, and for that reason they shall never inherit to each other. So also, if the father has two sons, A. and B., by different wives; now these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord. Nay, even if the father dies, and his lands descend to his eldest son A., who enters thereon, and dies seised without issue, still B. shall not be heir to this estate, because he is only of the half blood to A., the person last seised; but it shall descend to a sister (if any) of the whole blood to A.; for, in such cases, the maxim is, that the seisin or *possessio fratris facit sororem esse hæredem*. Yet had A. died without entry, then B. by force of the first rule might have inherited; not as heir to A. his half brother but as heir to their common father, who was the person last actually seised."

VII. In collateral inheritances male stocks preferred to female: unless lands descended from a female.

VII. "The seventh and last rule or canon is, that in collateral inheritances the male stocks shall be preferred to the female, (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near,)—*unless where the lands have in fact, descended from a female.*"

This rule explained by St. of Wm. annulled by St. of Vic.

Where lands descend from mother's side, no relation by father's side as such admitted.

Thus the relations on the father's side are admitted in *infinitum*, before those on the mother's side are admitted at all; and the relations of the father's father before those of the father's mother, and so on. This rule is explained by sections 19 & 20, consolidating the Act of William. Under the Act of Victoria it has no effect.

Whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed; and no relation of his by the father's side, as such, can ever be admitted to them; because he cannot possibly be of the blood

of the first purchasor. And so, *e converso*, if the lands descended from the father's side, no relation of the mother, as such, shall ever inherit. So also, if they in fact descended to John Stiles from his father's mother Cecelia Kempe; here not only the blood of Lucy Baker his mother, but also of George Stiles his father's father, is perpetually excluded. And, in like manner, if they be known to have descended from Frances Holland, the mother of Cecelia Kempe, the line not only of Lucy Baker and of George Stiles, but also of Luke Kempe, the father of Cecelia, is excluded; whereas, when the side from which they descended is forgotten, or never known, (as in the case of an estate newly purchased to be holden *ut feudum antiquum*) here the right of inheritance first runs up all the father's side, with a preference to the male stocks in every instance; and if it finds no heirs there, it then, and then only, resorts to the mother's side.

"Before concluding this branch of our inquiries, it may not be amiss to exemplify these rules by a short sketch of the manner in which we must search at common law for the heir of a person, as *John Stiles*, who dies seised of land which he acquired, and which therefore he held as a feud of indefinite antiquity (*a*)."

Exemplification of these rules.

"In the first place succeeds the eldest son, Matthew Stiles, or his issue: (No. 1.)—if his line be extinct, then Gilbert Stiles and the other sons, respectively, in order of birth, or their issue: (No. 2.)—in default of these all the daughters together, Margaret and Charlotte Stiles, or their issue: (No. 3.)—On failure of the descendants of *John Stiles* himself, the issue of Geoffrey and Lucy Stiles, his parents, is called in:—viz. first, Francis Stiles, the eldest brother of the whole blood, or his issue: (No. 4.)—then Oliver Stiles, and the other whole brothers, respectively, in order of birth, or their issue: (No. 5.)—then the sisters of the whole blood altogether, Bridget and Alice Stiles, or their issue: (No. 6.)—in default of these, the issue of George and Cecilia

(a) See the table of descents.

Stiles, his father's parents; respect being still had to their age and sex: (No. 7.)—then the issue of Walter and Christian Stiles, the parents of his paternal grandfather: (No. 8.)—then the issue of Richard and Anne Stiles, the parents of his paternal grandfather's father: (No. 9.)—and so on in the paternal grandfather's paternal line, or blood of Walter Stiles, *in infinitum*. In defect of these, the issue of William and Jane Smith, the parents of his paternal grandfather's mother: (No. 10.)—and so on in the paternal grandfather's maternal line, or blood of Christian Smith, *in infinitum*: till both the immediate bloods of George Stiles, the paternal grandfather, are spent.—Then we must resort to the issue of Luke and Frances Kempe, the parents of *John Stiles's* paternal grandmother: (No. 11.)—then to the issue of Thomas and Sarah Kempe, the parents of his paternal grandmother's father: (No. 12.)—and so on in the paternal grandmother's paternal line or blood of Luke Kempe, *in infinitum*.—In default of which we must call in the issue of Charles and Mary Holland, the parents of his paternal grandmother's mother: (No. 13.)—and so on in the paternal grandmother's maternal line or blood of Frances Holland, *in infinitum*; till both the immediate bloods of Cecilia Kempe, the paternal grandmother, are also spent.—Whereby the paternal blood of *John Stiles* entirely failing, recourse must then, and not before, be had to his maternal relations; or the blood of the Bakers, (Nos. 14, 15, 16,) Willis's, (No. 17,) Thorpe's (Nos. 18, 19.) and White's, (No. 20.) in the same regular successive order as in the paternal line."

If person last
seised took by
inheritance,
the blood of
that line of an-
cestors from
which land did
not descend
never inherit.

In case *John Stiles* was not himself the purchasor, but the estate in fact came to him by descent from his father, mother, or any higher ancestor, there is this difference; that the blood of that line of ancestors, from which it did not descend, can never inherit: as was formerly fully explained. And the like rule, as is there exemplified, will hold upon descents from any other ancestors.

Explanation of
the table.

It should be borne in mind, that during this whole process, *John Stiles* is the person supposed to have been last

actually seized of the estate. For if ever it comes to vest in any other person, as heir to *John Stiles*, a new order of succession must be observed upon the death of such heir ; since he, by his own seisin, now becomes himself an ancestor or *stipes*, and must be put in the place of *John Stiles*. The figures therefore denote the order in which the several classes would succeed to *John Stiles*, and not to each other : and before we search for an heir in any of the higher figures, (as No. 8) we must be first assured that all the lower classes (from No. 1 to No. 7) were extinct, at *John Stiles'* decease.

Such were the seven canons referred to by Blackstone as regulating descent at common law : and we now come to consider the changes introduced by Stat. 4 Wm. IV., ch. 1, Con. Stat. ch. 82.

DESCENT UNDER THE STATUTE OF WILLIAM.

CON. STAT. CH. 82, SECTIONS 1, 2, 3, 15 & 16.

1. The eighteenth section of the interpretation Act is not to apply to this Act.

2. This Act shall not extend to any descent which took place on the death of any person who died before the first day of July, one thousand eight hundred and thirty-four. 4 W. 4, c. 1, s. 11. Relation of the Act.

3. The next ten sections of this Act numbered from four to thirteen shall apply retrospectively to the sixth day of March, one thousand eight hundred and thirty-four, and also prospectively (as the case may be), and shall be construed as if the same had been enacted and passed on the said sixth day of March, one thousand eight hundred and thirty-four. 4 W. 4, c. 1, s. 11. How the next ten sections are to apply.

15. The foregoing sections of this Act shall not have operation retrospectively to a period of time anterior to the sixth day of March, one thousand eight hundred and thirty-four, so as, by force of any of their provisions, to render any title valid, which in regard to any particular estate had prior to that day been adjudged, or has been or may be in any suit which was depending on that day adjudged invalid, on account of any defect, imperfection, matter or thing, which is by such Sections altered, supplied or remedied ; but in every such case the law in regard to any such The foregoing sections not to operate retrospectively in certain cases.

defect, imperfection, matter or thing, shall, as applied to such title, be deemed and taken to be as if those Sections of this Act had not been passed. 4 W. 4, c. 1, s. 60.

Relation of
this Act as to
descents be-
tween the 1st
July, 1834,
and 31st De-
cember, 1851.

16. As respects every descent between the first day of July, one thousand eight hundred and thirty-four, and the thirty-first day of December, one thousand eight hundred and fifty-one, both days included, and as respects any descent not included or provided for in the Sections of this Act, numbered from twenty-three to forty-nine, both included, the following sections numbered from seventeen to twenty-one, both included, shall apply retrospectively to the first day of July, one thousand eight hundred and thirty-four, and also prospectively, as the case may be, and shall be construed as if the same had been passed on the said first day of July, one thousand eight hundred and thirty-four. See 14, 15 V. c. 6, s. 1.

It may be mentioned as to these sections, that they will be best understood by the remark that the original Stat. 4 Wm. IV., ch. 1, was passed on 6th March, 1834, and it is for that reason that day is referred to in the Con. Stat.; also, that some of the provisions of the original Act were not to take effect till 1st July, 1834, and the Act ceased to apply after 31st December, 1851.

SECTIONS 14 & 4.

Meaning of
words in this
Act.

14. The words and expressions in the foregoing sections and in the next seven sections numbered from fifteen to twenty-one inclusive, which in their ordinary signification have a more confined or a different meaning, shall, in all such sections, except where the nature of the provision or the context thereof shall exclude such construction, be interpreted as follows, that is to say: the word "land" shall extend to messuages, and all other hereditaments, whether corporeal or incorporeal, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties, or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights,

Land.

titles and interests, or any of them, shall be in possession, reversion, remainder or contingency; and the words "the purchaser" shall mean the person who last acquired the land otherwise than by descent or than by any partition, by the effect of which the land shall have become part of or descendible, in the same manner as other land acquired by descent; and the word "descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue; and the expression "descendants of any ancestor" shall extend to all persons who must trace their descent through such ancestor; and the expression "the person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; and the word "assurance" shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and the word "rent" shall extend to all annuities and periodical sums of money charged upon or payable out of any land; and the "person through whom another person is said to claim," shall mean any person by, through or under, or by the act of whom the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the courtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee or otherwise; and every word importing the singular number only, shall extend and be applied to several persons or things, as well as to one person or thing; and every word importing the masculine gender only, shall extend and be applied to a female, as well as to a male. 4 W. 4, c. 1, s. 59.

4. In every case, on and after the first day of July, one thousand eight hundred and thirty-four, descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried farther back than the circumstances of the case and the nature of the title require, the person last entitled to the land shall for the purposes of this Act be considered to have been the purchaser thereof, unless it be proved that he inherited the same, in which case, the person from whom he inherited the same shall be considered to have been the purchaser, unless it be proved that he inherited the same; and, in like manner, the last person from whom the land shall be proved to have been inherited shall

in every case be considered to have been the purchaser, unless it be proved that he inherited the same. 4 W. 4, c. 1, s. 1.

Sec. 4, by requiring descent to be traced from the *purchaser* instead of from the person last actually seised, makes a most important change in the first canon of descent; the first part of which was that "the inheritance should descend to the issue of the person who last died *actually seised*;" so that though such person were actually *entitled*, yet if he did not die *actually seised*, he was passed by in the order of descent, and inheritance had to be traced from some other actually seised, from whom then the person claiming as heir was taken to inherit directly. What constituted actual seisin has been above explained (a) : by this Act the common law requirements of seisin is abolished.

Sec. 14 defines
word pur-
chaser,

By sec. 14 the word "purchaser" is declared to mean "the person who last acquired the land otherwise than by descent, or than by any partition, by the effect of which the land shall have become part of or descendible in the same manner as other land required by descent." These latter words as to partition refer to such a case as a partition by parceners to whom lands have descended; on partition by them they shall not be considered as taking as purchasers, by reason of such partition. By the effect of the statute, therefore, the word "purchaser" has a much larger scope than in its ordinary acceptation, and would include all persons who take not only in the strict sense of the word, but by gift, devise, &c., in short, in every other way than by descent or partition as named in the Statute.

The sense and capacity of taking by purchase, is also, in contravention of common law rules considerably enlarged by sections 5, 6, 8 and 9, as hereafter explained.

defines also
"the person
last entitled."

By the same section also the words "the person last entitled to land," shall "extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof:" and by force of the extended signification given to the word "land" the act has an equivalent extended effect.

Table of Consanguinity.



All the degrees of collateral kindred to the *proprieus* are computed, so far as the tenth of the civilians and the seventh of the canonists inclusive; the former being distinguished by the numeral letters, the latter by the common cyphers.

ward
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Hannah
Willis
49

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ales
2

M

Edward
Willis

Dorothy
Carter

33

Hannah
Willis

40

Anna
Edw
A-D
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Anna of
Hannah
Hullbice

50

Andrew
Walker

60

ice
ies

Sin of
Lucy
Hullbice

70

Charlotte
ules

80

We need not dwell long on the second branch of the fourth section, which is that "the person last entitled to the land shall be considered to have been the purchaser thereof, unless it be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it be proved that he inherited the same," and so *ad infinitum*. Last clause of sec. 4.

As hereafter explained, it shifts the descent sometimes materially, according to whether the person last entitled did or did not take in any other manner than by descent or partition, as named in sec. 14. The presumption created, that the last person entitled is the purchaser, is to avoid difficulties in the evidence, which would be great if the statute provided simply that descent should be traced from the purchaser.

In considering sec. 4, the question may suggest itself viz., what difference does it make whether descent be traced from the person last entitled, or from the person from whom he inherited? This will be best understood by considering the following cases in illustration of the question; and it will be seen that there is sometimes a most material difference. Difference between tracing from person last entitled, and the person from whom he inherited.

Assume Geoffrey (in the second table of descents) to have been the purchaser, and to have died intestate, leaving only Francis, his eldest son, and a daughter, Bridget, by one wife, and another son, No. 8, by another wife; thus No. 8 would be brother of the half blood to Francis and Bridget: suppose further that Francis, as heir at law to Geoffrey, entered, and died intestate, without issue: the question is, to whom does the estate descend? Bridget claims, as sister of the whole blood, in preference to No. 8, brother of the half blood to Francis, and she insists that descent, under this section, has to be traced from Francis, as purchaser, on the presumption that as being last entitled, he was the purchaser. No. 8, on the other hand, displaces this presumption, by shewing that Francis inherited from Geoffrey, and consequently that Geoffrey is to be taken to be the purchaser, and as such, descent is to be traced from him; in which case by force of the second common law Instances.

canon (that the male shall be admitted before the female, which is not interfered with by the statute), he, No. 8, would be entitled to take as son of Geoffrey, in preference to Bridget the daughter; and this would be so. But if descent were to be traced from Francis, the person last seised and entitled, as being the purchaser, and not from Geoffrey; then of course Bridget would take as of the whole blood to him, in preference to the brother of the half blood; and the 21st section (subsequently explained) in such latter case, expressly postpones the half blood.

Difference in tracing descent from person last seised and from person last entitled not seised

The above case will also serve to exemplify the different effect introduced by the statute in abolishing the tracing descent from the person last seised, and introducing the purchaser or person last entitled as the stock of descent, without regard to seisin (*a*). At common law as Francis was the person last seised, and so descent had to be traced from him, No. 8, his brother of the half blood, not only would have been postponed by force of the 6th canon, as being a collateral relative not of the whole blood, but as before explained, he never could have taken under any circumstances, and the land would have escheated, as on failure of heirs, rather than that he should have taken: but in the same case under the statute, he not only takes as heir to Geoffrey, the purchaser, but in priority to the sisters of the whole blood to Francis, the person last seised (*b*).

Further instance.

In further exemplification, as well of the distinction between tracing from the person last seised, and from the purchaser; as also of the distinction under sec. 4, between tracing from the person last entitled, and from the person from whom he inherited, may be put a case of great hardship (*c*). Assume Geoffrey to be illegitimate, to acquire an estate by purchase, and die, leaving Francis his eldest son and heir at law, who enters, and dies intestate, without issue: here the land must escheat for want of heirs: for descent has to be traced, not from Francis, the person last

(*a*) See also ante pp. 126, 127, 128. (*b*) See post s. 21 of the Con. St.

(*c*) Doe. *Blackburn v. Blackburn*, 1 Moo. and R. 547, per Parke, B. post 169 n. a.

seised and last entitled, but from Geoffrey (as Francis inherited from him), and as Geoffrey was illegitimate, there can be no heirs; and thus the mother of Francis (wife of Geoffrey) and all claiming through her, are excluded, as not being of the blood of the purchaser. In England the hardships in this latter instance is removed by the 22nd and 23rd Vic., ch. 35, ss. 19, 20.

Take this further case: suppose No. 11, and Geoffrey in the second table of descents, brothers of the whole blood; Geoffrey has two sons, John and No. 8, by different wives, therefore half brothers: John purchases an estate and dies intestate, seised, without issue. Now before the statute, No. 11, the uncle of John, would be his heir, and not No. 8, his half brother; since No. 11 would be next collateral heir of the *whole* blood to John, the person last seised. Let us now go a little further, and assume that No. 11 entered and died after the passing of the statute, intestate, leaving A. his only son: here, if descent has to be traced from John, the purchaser, the heir will be, not A., the son of No. 11, but Geoffrey, if living, or if dead, No. 8, the half brother of John. If the descent has to be traced from the person last entitled simply, without regard to his having inherited, of course A., the son of No. 11, would take.

In the instance above, A. would take, but the strict literal construction of the Act, which would exclude A., is not without authority. *Watk. Conv.* 9 ed., 455, note by *Coventry*. 1 *Hayes, Conv.* 314. *Byth. & Jarm. Conv.* by *Sweet*, Vol. 1, 139, 140. Mr. Joshua Williams at one time supported this view. It will be observed the son of the person last entitled by a literal interpretation of the Act, would be excluded by a collateral relative of such person: a proposition which leads to the consideration of *Cooper v. France* (a), and other cases involving the same question, which is substantially this: whether, where the person last entitled, who has inherited the estate, dies, leaving children

When person last entitled who inherited dies, leaving children, does s. 4 apply, to the detriment of the children?

(a) 14 Jurist. 214—V. C. Shadwell; *Muggleton v. Barnett, et al*, 1 H. & N. 282, 2, H. & N. 653, s. c.

living, the statute is to be considered as applying so as to compel the descent to be traced, not from the parent, but from some prior purchaser, to the detriment of the children; who would thus, as in the circumstances of the two cases last above, not take the property as enjoyed by their parent. This question led to a controversy more widely spread and almost as famous in the profession as that which existed under the old law, wherein Lord Bacon, Sir Matthew Hale, Blackstone, and other authorities, differed (a); and the authorities in cases wherein the question is involved have differed in England, Canada, (b) and Australia (c).

*Cooper v.
France.*

In *Cooper v. France*, the case shortly in effect may be stated thus: A. was purchaser and died intestate, leaving two daughters, who took as coparceners. One of the daughters died leaving a son, her heir at law. The question was whether, as the mother inherited, descent was to be traced from the purchaser A., *quoad* her share; in which case, by a literal construction of the Statute, such share would again descend in coparcenary, and be divided equally between the surviving sister and the son of the deceased; so that the son would not get his mother's original share, one half, but only one half of one half, and the surviving sister his aunt the whole residue. It was decided however, that in such case the son would take his mother's whole share: such seems to be also the opinion of Lord St. Leonards (d), and of the present learned President of the Court of Error and Appeal. (e). Shadwell, V. C., thought in so plain a case the Act did not apply. In the case in Australia of *Badham v. Shiels*, 7 Jurist, N. S., 509, one Mary Cannon became indebted to the plaintiff in a specialty debt. She had inherited land from her father, the purchaser, and died intestate, leaving a son, her heir at law, who died, leaving the defendant his heir at law. The defendant was sued as having assets by descent from Mary Cannon; and his

*Badham v.
Shiels.*

(a) See post sec. 20, Con. Stat.

(b) *Wigle v. Merrick*, 8 C. P. U. C., 307.

(c) *Badham v. Shiels*, 7 Jur. N. S. 509.

(d) Sug. Stat. 280, 281. (e) *Wigle v. Merrick*, 8 C. P. U. C. 307.

defence was that as Mary Cannon inherited from her father, the purchaser, and descent therefore had to be traced from him, the estate was not assets in his, the defendant's, hands by descent from Mary Cannon, to satisfy her specialty debts. Two judges held that they were; another held that they were not.

Section 7 is treated of next after s. 21.

SECTION 8.

8. Proof of entry by the heir after the death of the ancestor shall in no case be necessary in order to prove title in such heir, or in any person claiming by or through him. 4 W. 4, c. 1, s. 10. Heir-at-law need not prove entry.

This section was in furtherance of the intention to abolish necessity of seisin to constitute a stock of descent; it is not in the Imperial Act, and appears to be superfluous (*a*), because as the descent is to be traced from the purchaser, it is indifferent whether the person last entitled was in actual seisin or not, for his seisin if it existed, would not affect the descent, which is not to be traced from him. Nor does this section abolish necessity for actual entry, or its equivalent, by an heiress, to qualify her husband to take as tenant by the curtesy (*b*).

SECTIONS 5, 6 AND 9.

5. When any land shall have been devised by any testator, who shall die after the first day of July, one thousand eight hundred and thirty-four, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee and not by descent; and when any land shall have been limited by any assurance, executed after the said first day of July, one thousand eight hundred and thirty-four, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have Heir entitled under a will shall take as devisee and a limitation to the grantor or his heir shall create an estate by purchase

(*a*) See the remarks of Draper, C. J., as to this section in *Wigle v. Merrick*, 8 C. P. U. C., 318, 319.

(*b*) See remarks ante p. 120, note *a*, and the judgment of Hagarty, J., in *Wigle v. Merrick*; *supra*.

acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto, as of his former estate or part thereof. 4 W. 4, c. 1, s. 2.

When heirs take by purchase under limitations to the heirs of their ancestor, the land shall descend as if the ancestor had been the purchaser.

6. When any person shall have acquired any land by purchase, under a limitation to the heirs, or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said first day of July, one thousand eight hundred and thirty-four, or under a limitation to the heirs, or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said first day of July, one thousand eight hundred and thirty-four, then and in any of such cases, such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land: 4 W. 4, c. 1, s. 3.

Limitations made before 1st July, 1834, to the heirs of a person then living, shall take effect as if this Act had not been made.

9. Where any assurance executed before the said first day of July, one thousand eight hundred and thirty-four, or the will of any person who died before that day, contains any limitation or gift to the heir or heirs of any person under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this Act had not been made, shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said first day of July, one thousand eight hundred and thirty-four. 4 W. 4, c. 1, s. 12.

S. 5. Reasons for first branch of it.

Of course, when so important a change was made as requiring descent to be traced from the purchaser, instead of from the person last actually seised, it became requisite to provide for many cases in which, by the common law persons were considered as taking by descent, although the facts were such as shewed an apparent intent that they should not so take; as in the case for instance, of the heir at law taking by devise from his ancestor. Here, if the devise were to take effect in the same way as the estate would have descended to the devisee as heir at law, he was not considered as taking under the will, as a purchaser, as would be the case with any devisee not being the heir at

On devise to heir he took still by descent at common law,

law, but he was considered as taking by descent (a), so that if this rule had not been altered by the statute, on the death of such person intestate, descent would after the statute, have been traced not from him, but from his ancestor, if the purchaser. To remedy this particular case, under St. Wm. the first branch of the 5th section was passed, declaring as purchaser, that the heir at law should not be considered as taking by descent, but as devisee; in other words, as purchaser. It this varied by Stat. Vic. will be seen that under section 52, and other sections of the statute of Victoria, the effect of this section is much varied.

The bearing and importance of this first clause of sec. 5, Effect of s. 5, c. 1. may be illustrated by the following case, viz., that Geoffrey, the purchaser, died, leaving as his eldest son and heir at law, Francis, and leaving also a daughter, Bridget, by one wife, and another son, No. 8, by a second wife, and consequently brother of the half-blood to Francis. Assume Geoffrey to have devised the land to his heir at law, Francis, in fee: now but for sec. 5, the devise would have been wholly inoperative to alter the descent, since Francis, notwithstanding it, would have been in by descent, and not as purchaser: consequently, as before explained, as Francis inherited from Geoffrey, and Geoffrey was the purchaser, the person claiming as heir would have to make himself heir to Geoffrey; and this would be No. 8, the son of Geoffrey, and the brother of the half-blood to Francis, to the exclusion of Bridget, the sister of the whole blood: but, by virtue of sec. 5, this would not take place, for by it the devise would operate so as to make Francis take as purchaser, and the party claiming would have to make himself heir to him, and not as above to his father Geoffrey: now the heir to Francis would be Bridget, his sister of the whole blood, in preference to No. 8, his brother of the half-blood.

As to the last clause of section 5, and sections 6 and 9, Latter part of s. 5 and ss. 6 and 9. these may be considered together, and the change effected

(a) Ante, pp. 128, 129.

by them will be best understood by considering the prior law on the subject (a), bearing in mind the distinction between "heirs of the body," and "right heirs," which latter term includes collateral relatives, as brother, uncle, and their issue.

when and how ancestor could by conveyance make them take by purchase, and not by descent.

At common law, the heir wherever it was practicable, took by descent as his better title; and no man could by deed, without departing with the whole estate out of him, raise a fee simple to his own *right heirs* by that name as *purchasers*: nor could he by deed at *common law*, make the heirs of his body take by purchase: and though by way of use he could effect the latter object, yet he could not make his heirs *general* take by purchase, or alter the descent by such a limitation by way of use. To effect that object, it was necessary to depart with the whole estate, and take under a *new conveyance* back, an estate which would vest in him, or his heirs by purchase, according to limitation. What is above stated may be exemplified partially by the following: assume A. to be seised in fee, and before the statute to convey by a common law conveyance, as feoffment, or lease and re-lease, to B. for life, with remainder to the heirs of the body of him A.; or with various remainders, and an ultimate remainder to his right heirs. Here the heirs of the body in the one case, and the right heirs in the other, would take by descent, and not by purchase; the remainders would be considered as of the old estate. But if A. had by common law conveyance, conveyed to C. in fee to the use of B. for life, and on his death to the use of the heirs of the body of him A. in remainder; here, as the limitation is by way of use, A.'s heirs of the body would take by purchase, and not by descent. But A. could not so make his *right heirs* take by purchase: as, if the conveyance had been to the use of A. the grantor for life, and on his death without issue to the use of his right heirs in fee; the right heirs would nevertheless take by descent. To have made the right heirs take

(a) Sugden's Statutes, 269, 260, 2nd Ed.

by purchase, it would have been requisite for A. to have conveyed to B. in fee, and then by a new and distinct conveyance to have taken back the estate with the requisite limitations. The law on this head, as it existed at common law, was before alluded to, and an instance given of the practical effect of the alteration by the statute (a).

The following remarks of Mr. Hayes, in reference to the above sections, will be of service; he says: (b) "If A seised in fee, convey or devise either at the common law or by way of use, to B and the heirs of his body, or to B and his heirs, B will take an estate in fee-tail or fee simple by purchase, and the word *heirs* will be merely a word of limitation indicative of the quantity or duration of his estate. If A, so seised, convey, at the common law, to B for a particular estate, as for life, or in tail, with reversion to himself (A) and his heirs, or, without naming himself as an object, (for the result will be the same), to his heirs or right heirs; or convey, by way of use, to himself (A) and his heirs or right heirs, or, without naming himself as an object, to his heirs or right heirs, either in possession or in reversion, or by way of springing use, A will take an estate in fee by purchase, and the word *heirs* will be merely a word of limitation indicative of the quantity or duration of his estate; for though, in the instance of the limitation to his heirs or his right heirs, it is by the attraction of his former ownership, and not by force of the express terms of the instrument, that the fee reverts in *him*, yet the statute (sec. 3), imbues that fee with the descendible qualities of a new estate. In fact, A takes, under his own assurance, as if the estate were to him and his heirs of the gift of a stranger: and where he creates a particular estate, limiting the expectant fee to himself and his heirs, or without naming himself as an object, to his heirs, he takes the fee, for the purposes of descent at least, not as a reversioner, but as a remainder-man. But where, on a conveyance at the common law, creating particular estates

(a) Ante pp. 128, 129.

(b) Hayes Conv. 5 ed., vol. 1 p. 317.

only, the fee tacitly remains in the grantor; and where on a conveyance to uses, not disposing of the ultimate use, or of any use, the use of the fee tacitly results to the grantor, his former estate is preserved. If A, so seised, devise to his heir, or to the person who shall sustain that character, individually, the devisee will take, as such, by purchase, in the same manner as if he were a stranger. Again, if A, so seised, convey or devise, either at the common law or by way of use, to the heirs of the body, or to the heirs or right heirs of B, (who, if the conveyance be at the common law, must be a deceased person, since it would otherwise be void, as being a conveyance *in futuro*) the heir will take, as a purchaser, an estate commencing in himself, but the statute will direct the succession through the line of heirs of the ancestor, in the same manner as if the estate had really commenced in such ancestor; and consequently, a limitation to the heirs, as purchasers, of the maternal ancestor will pursue the maternal line. It is hardly necessary to observe, that if the limitation to the heirs of B, were preceded by the limitation to him of a particular estate of freehold of the same quality, legal or equitable, the limitation to his heirs would then operate, by force of a well-known rule of law as a limitation to himself and his heirs; whereas in the case of a limitation to the heirs of A, the *grantor*, it is wholly immaterial whether there be any such prior limitation to him or not, since *he*, in respect of his former ownership, will always take the benefit of the limitation to his heirs, though now by force of the statute (sec. 3), he will take it as a purchaser."

Before concluding considerations of these sections, it may be observed that there is an apparent anomaly as regards the hereditary quality of an estate affected by sec. 6: thus, if lands be limited by a stranger to A for life, with remainder to the heirs of B, and B die during the particular estate, his heir will take as purchaser; but for the purpose of tracing descent, the ancestor B is to be deemed the purchaser; and it makes no difference that the ancestor, who for the purpose of tracing descent from him

is to be treated as the purchaser, takes no interest in the land (a).

SECTIONS 17 AND 18.

17. No brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent. 4 W. 4, c. 1, s. 4. Brothers and sisters shall trace descent through parents.

18. Every lineal ancestor shall be capable of being heir to any of his issue, and in any case where there is no issue of the purchaser his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of their being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue. 4 W. 4, c. 1, s. 5. Lineal ancestor may be heir in preference to collateral persons claiming through him.

These sections may be considered together. It must be borne in mind that at common law the inheritance never *lineally ascended*, but only collaterally (b). Section 18 alters the common law rule of excluding the lineal ancestors; and by it the father of the purchaser will take before his children, the brothers and sisters of the purchaser; and the grandfather before *his* children, the uncles and aunts of the purchaser, and so on in the ascending scale *ad infinitum*, contrary to the common law. Section 17 resulted from the enactment of sec. 18 (c). Under these sections alone the half blood of the purchaser cannot inherit by descent from the common ancestor, for it is only by sec. 21, that the common law rule is abrogated which required that the collateral kinsman to take as heir, should be of the whole blood. Establishing right of lineal ancestor in preference to collateral relative.

The Act of Vic. by ss. 27 and 28, recognizes the right of the *parents* of an intestate to take in preference to his brothers or sisters, but only in certain cases to a limited extent. The act of Vic. extends only to parents.

(a) Sugden's Statutes 260.

(b) Ante p. 120.

(c) See the former law p. 136.

The male line to be preferred. 19. None of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants have failed ; and no female paternal ancestor of such person, nor any of her descendants shall be capable of inheriting, until all his male paternal ancestors and their descendants have failed, and no female maternal ancestor of such person, nor any of her descendants shall be capable of inheriting, until all his male maternal ancestors and their descendants have failed. 4 W. 4, c. 1, s. 6.

The mother of the more remote male ancestor to be preferred to the mother of the less remote male ancestor. 20. Where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants ; and when there shall be a failure of male paternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor and her descendants. 4 W. 4, c. 1, s. 7.

It will be observed that these sections proceed on much the same principles as governed under like circumstances at common law, with the variation only of admitting the lineal ancestors to take before their issue. The Act of Victoria by ss. 27 and 28, also recognizes the right of lineal ancestors in the first degree, as parents of the intestate, to take, but in certain cases to a modified extent only.

S 19. Male line of ancestors preferred to female. For the consideration of section 19, it is necessary that there should be a proper appreciation of the words, paternal ancestor, maternal ancestor, male paternal ancestor, female paternal ancestor, male maternal ancestor, female maternal ancestor.

Definition of paternal, maternal, male paternal, female paternal, male maternal, female maternal, ancestors. In one sense, paternal ancestor, and male paternal ancestor, mean one and the same class of persons ; thus by examining the table of descents it will be seen that Geoffrey, George, Walter, and Richard Stiles, answer the description of paternal as well as male paternal ancestor. It is when the term *male paternal ancestor* is used in connection

with, and in contra-distinction to *female paternal ancestor*, that it bears a different signification from *paternal ancestor*. Thus in speaking of the paternal ancestor George Stiles, (No. 10) in connection with his wife, Cecilia Kempe, (No. 24) he would be termed the *male paternal ancestor*, and she the *female paternal ancestor*; and so in reference to Walter and Richard Stiles and Cecilia Kempe; or Richard or Walter Stiles and Christian Smith, (No. 19) and it is to convey this distinction that the terms male paternal and female paternal ancestors are used in the statute. Every mother of a lineal paternal ancestor of a purchaser, is a female paternal ancestor. The converse of the above holds in reference to *female maternal ancestors* and *male maternal ancestors*; thus Lucy Baker, (No. 37) Esther Thorpe, (No. 54) Emma White, (No. 62) and Catharine Ward, (No. 66) are maternal ancestors in direct line of lineal ascent; but spoken of in connection with other ancestors of the purchaser on the mother's side, they would be termed *female maternal ancestors*. Thus Esther Thorpe, 54, the grandmother of the purchaser, spoken of in connection with Andrew, 40, Herbert, 43, or Henry Baker, 46, would be termed the female maternal ancestors, and they the male maternal ancestors. Every mother of a lineal maternal ancestor is a female maternal ancestor. Both male maternal and female maternal ancestors, trace and ascend through the mother of the purchaser; whilst the male paternal and female paternal trace and ascend through the father of the purchaser.

The first clause of sec. 19 provides that *maternal ancestors* shall be postponed to *paternal ancestors* and their descendants: thus before the mother of the purchaser, Lucy Baker, or any one claiming through her can take, the paternal ancestors in direct line of lineal ascent, and the descendants of each must fail.

The second clause provides that no *female paternal ancestor*, or her descendants, shall take until the male paternal ancestors and their descendants shall have failed. The first clause only postponed the maternal ancestors, this post-

pones the female paternal. Thus the mother of the purchaser's father is postponed, and those claiming through her, (though perhaps of nearer consanguinity), to the male paternal ancestors and their descendants; thus Richard Stiles, No. 16, and his descendants, will be preferred to the mother of the father of the purchaser, Cecilia Kempe, No. 24.

The last clause of sec. 19 provides that no *female maternal ancestor*, or her descendants, shall inherit till all the male maternal ancestors and their descendants have failed; thus the mother of the mother of the purchaser, Esther Thorpe, No. 54, is postponed till the father of the mother of the purchaser, Andrew Baker, No. 40, and his descendants, and his paternal ancestors and their descendants shall have failed. Under this 19th section, the same preference is given to males among the purchaser's ancestors, as among his descendants. It will be observed that this and the following section proceed on much the same principles as prevailed under like circumstances at common law, with the variation of allowing the lineal ancestors to take.

S. 20. Mother of more remote to take in preference to mother of less remote male paternal ancestor.

Section 20 provides for cases, which it will be seen are not touched by the section 19, and were left in doubt at common law, viz., who shall take on failure of the male paternal ancestors and their descendants; and who on failure of the male maternal ancestors and their descendants, thus suppose the male paternal ancestors, Geoffrey, George, Walter, and Richard Stiles, and their descendants to have failed; who now would take? Would it be Anne Godfrey, No. 18, the mother of Walter Stiles, the most remote male paternal ancestor; or would it be Cecilia Kempe, No. 24, the mother of the least remote male paternal ancestor? Reference to section 19 will shew that it does not apply to claims between female paternal ancestors as *among themselves*, nor to male maternal ancestors, among *themselves*.

The question settled by the 20th section was a very celebrated one, and one on which the most learned writers differed, as Lord Bacon, Sir Matthew Hale, Blackstone,

Watkins, and others. The 20th section now settles the point, and under it, Anne Godfrey would take priority over Cecilia Kempe, so also would Christian Smith, 19, for the same reason ; and all claiming through Christian Smith, as her children, father, or mother, tracing their descent from her as entitled before Cecilia Kempe, would also be so entitled.

In the second clause of the 20th section there is a mistake, and the same mistake occurs in the original statute 4 Wm. IV. The wording is "failure of male *paternal* ancestors," whereas it should be "male *maternal* ancestors." It is manifest it should be "*maternal*," because the intention was, and the necessity was, to provide for a similar case among the male *maternal* ancestors as was just above provided for among the male *paternal* ancestors, which case among the male maternal ancestors as between themselves, was left untouched by the 19th section. Thus, on failure of the male maternal ancestors Andrew, 40, Herbert, 43, and Henry Baker, 46, and their descendants, who would take? Would it be Susan Bates, 48, the mother of the most remote, or Hannah Willis, 49, the mother of the less remote male maternal ancestor? This again, was the same question on which the learned writers above referred to have differed, and the manifest intention and necessity was to provide for this case. Sense and effect can however be given to this clause, by rejecting part as surplusage, and reading it thus, "and the mother of the more remote male maternal ancestor, &c."

S. 20, latter part. Mother of more remote male maternal ancestor to take in preference to mother of less remote.

SECTION 21.

Any person related to the person from whom the descent is to be traced by the half blood, shall be capable of being his heir, and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood and his issue, where the common ancestor shall be a male, and next after the common ancestor when such common ancestor shall be a female, so that the brother of the half blood on the

Half-blood to inherit after the whole blood of the same degree.

part of the father, shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother, shall inherit next after the mother. 4 W. 4, c. 1, s. 8.

By the combined operation of sections 17 & 18 alone, the half blood of the purchaser would not have been admitted, as by this section only is the common law rule rescinded which required the collateral kinsman to take as heir should be of the whole blood.

Half-blood never took at com. law from each other.

We now come to relationship and descent of the half blood. As before mentioned (a), the half-blood could never succeed by descent to each other. The land would escheat rather, if there were no other heirs. Thus, if Geoffrey purchased and died intestate, seised in fee, leaving only John his eldest son and heir at law by his first wife, and No. 8, his second son by another wife; and John entered and died seised, without issue, No. 8 could never inherit at common law to his half brother, nor could John to him, No. 8. But if John had not died seised; then, as descent at common law was traced from the person last actually seised, who was Geoffrey, No. 8 might have inherited, not as heir to John, but as son and heir to Geoffrey.

Instances of application and non-application of s. 21 as to half-blood.

Such a case as this is remedied by the operation of the 4th section alone, without reference to the 21st, which in fact does not apply to such a case. That section only applies to the case of a person related by the *half blood* to the person *from whom descent is to be traced*: but, in the above case, No. 8, in tracing his descent, is not related by the *half blood* but by the *whole blood* to Geoffrey, his father (the purchaser), from whom descent is to be traced on its being shewn that John inherited: and consequently s. 21 does not, and s. 4 alone does apply; and the latter gives No. 8 the estate, and that in preference even to any sisters of the whole blood of John, the person last entitled, so that the half blood actually excludes the whole blood of the person last entitled. What s. 21 provides for is not

(a) Ante pp. 134, 137.

such a case as above, but such as follows : assume, in the above case, John to have been the purchaser, instead of having inherited from Geoffrey as the purchaser, and to have died seised without issue, leaving only his father Geoffrey, his sister Bridget, and his half brother No. 8 him surviving. Now in this case also at common law, No. 8 could never inherit ; but under the statute, on John's death, the estate would go to the father Geoffrey, and on his death, since he inherited, descent would be traced, not from him, (in which case it would go to No. 8,) but from John ; and therefore Bridget, his sister of the whole blood, would take in preference to No. 8, the brother of the half-blood. Now on Bridget's death after entry, without issue, an heir would be wanted ; and at common law this heir would not be No. 8, who could not inherit (being of the half blood), but would be Bridget's uncle, the brother of Geoffrey, or other collateral ancestors : but under s. 4, on Bridget's death, descent would have to be traced again from John, the purchaser, and No. 8 would be within the exact words of section 21, viz, a " person related to the person from whom the descent is to be traced, by *the half-blood*," and therefore he would be capable of inheriting, and he would be, in the words of that section, " a brother of the half-blood on the part of the father " inheriting " next after the sister of the whole blood on the part of the father."

Thus again, in the table of descent, Nos. 8, 9, and 9, the issue of Geoffrey Stiles, and of the half-blood to John the purchaser, would at common law never inherit, at least by tracing descent from him ; but under section 21 they take next after the sisters of the whole blood on the part of the father, Bridget and Alice Stiles.

Where the *common ancestor is a female*, as where the half-blood is related through a mother on a second marriage, instead of through a father ; here the half-blood take immediately after the mother, the common ancestor, since such mother does not take herself till all the paternal ancestors and their descendants are exhausted.

Where half-blood are related not through the father but the mother.

Under certain circumstances the half-blood to the per-

son last entitled are not admitted to inherit: thus, if John were last entitled, and shewn to have inherited from his father Geoffrey, the purchaser, his half blood on his mother's side, Nos. 38 and 39, never take; in fact the maternal ancestors of John and their descendants are all excluded, as having in them none of the blood of Geoffrey the purchaser. And so also, if John were shewn to have inherited from his mother the purchaser, the whole paternal side including the half-blood on that side are excluded. S. 21 admits only the half-blood of *the person from whom descent is to be traced*, and in neither of the above cases have the half blood to John any of the blood of such person; in both cases the estate will escheat rather than such half-blood or ancestors be admitted to inherit.

The hardship of the above case, as also of a case before referred to (a), would not have arisen if the Act had followed the report of the real property commissioners, who recommended that descent should be traced from the person last entitled, and not from the purchaser; and Lord St. Leonards has expressed his approval of this plan (b).

The Statute of Victoria has dealt in many respects more liberally with the half-blood than this Act.

SECTION 7.

After the death of a person attainted his descendants may inherit.

7. When the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, died before such descent shall have taken place, then such attainer shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation if he had not been attainted, unless such land escheated in consequence of such attainer before the first day of July, one thousand eight hundred and thirty-four. 4 W. 4, c. 1, s. 9.

Imp. St. 3 & 4 Wm. 4, c. 106, s. 10, and in connection with it should be considered the provisions of the Prov. Act 3 Wm. 4, ch. 4, Con. Stat. U. C., ch. 116, taken from the Imp. Act 54 Geo. 3, ch. 145.

(a) Ante, p. 146.

(b) Sug. Stat. 263.

CON. STAT. CHAP. 116.

AN ACT RESPECTING CORRUPTION OF BLOOD.

1. Except in cases of high treason, and of abetting, procuring or counselling the same, an attainder for felony, shall not extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person, other than the right or title of the offender during his natural life only.

Except for high treason, no attainder to disinherit the heir-at-law.

2. Every person to whom, after the death of any such offender, the right or interest to or in any lands, tenements or hereditaments should or would have appertained if no such attainder had taken place, may enter into the same.

After death of the person attainted the heir may enter.

These sections are taken from the Imp. Stat. 54 Geo. 3. ch. 145.

Imp. St. 54 Geo. 3, c 145.

There was a distinction between forfeiture to the Crown and escheat to the lord (a), but the distinction is of little importance here; there being no mesne lords, and all fee simple lands being held of the Crown, the Crown would take whether on forfeiture or by escheat.

The law of escheat on attainder for treason or felony is thus described by Sir W. Blackstone: "The blood of the tenant being utterly corrupted and extinguished, it follows not only that all that he now has shall escheat from him, but he shall be incapable of inheriting anything for the future. There is yet a further consequence of the corruption and extinction of hereditary blood, which is this: that the person attainted shall not only be incapable himself of inheriting or transmitting his own property by heirship, but shall also obstruct the descent to his posterity, in all cases where they are obliged to derive their title through him from any remoter ancestor." Therefore in the case of grandfather, father, and son, and the father attainted, and dying in the lifetime of the grandfather who dies seised in fee, the son at common law could not inherit, but under sec. 7 he can. As the descent between brothers was at common law immediate, and the father need not

Escheat and corruption of blood on attainder.

(a) 2 Black. Com. p. 251.

have been named in the pedigree, his attainder would not prevent one brother from inheriting to the other (a).

The case of fee tail differed from a fee simple at common law, as the issue in tail claimed *per formam doni*; therefore, if the son of donee in tail were attainted and died in the lifetime of his father, leaving issue, the latter would take notwithstanding the attainder. (b).

Con. Stat. ch. 82 does not prevent escheat as to vested estates

In such case the Con. St. c. 116 applies, except in cases of treason. 7 Anne, c. 21, applies in cases of treason.

The Act of 4 Wm. 4, alone would not apply to prevent an escheat where the estate was *vested* in the party attainted, as it applies only to tracing descent *through* him. The Act of 3 Wm. 4, however, prevents escheat or forfeiture in such case beyond the life of the offender, but still it does not apply in cases of treason. The Stat. of 7 Anne, ch. 21, sec. 10, is in terms the same as the Act of 4, Wm. 4, except that it only applies in cases of treason. Its operation was postponed by the Stat. 17, Geo. 2, ch. 39, till after the death of the Pretender and his sons, and both these Acts were repealed in England by the Imp. Act, 39 Geo. 3, ch. 93. As this repealing Act was passed in England subsequently to the grant of a Constitution to Canada, and the introduction of the English law as it then stood by Prov. Act 32 Geo. 3, ch. 1, it is not in force, and has no repealing effect here (c); unless, indeed, it is to be deemed of such general import to all British subjects, as by its mere enactment to apply to all British Colonies (d). If the Imp. Act does not apply, then, as Cardinal York, the last son of the Pretender, died in 1807, it would seem that in Canada in cases of treason, corruption of blood and forfeiture, except for life of the offender, is abolished.

SECTION 10.

Grantees, devisees, &c., shall not take

10. Whenever by any letters patent, assurance or will, made and executed after the first day of July, one thousand eight

(a) 1 Vent. 413. (b) Dowie's case, 3 Rep. p. 25.

(c) Dunn v. O'Reilly, 11 C. P. U. C., 404; Blackstone Com. by Leith, p. 17.

(d) Brook v. Brook, 9, H. L. Ca., 1861, pp. 214, 222, 240; Blackstone Com. by Leith, p. 21. See also the words "necessary intentment" in the Imp. Act 3 & 4 Vic., ch. 35, sec. 3, Con. Stat. Ca., p. 20.

hundred and thirty-four, land shall be granted, conveyed or devised to two or more persons other than executors or trustees, in fee simple, or for any less estate, it shall be considered that such persons took or take as tenants in common, and not as joint tenants, unless an intention sufficiently appears on the face of such letters patent, assurance or will, that they shall take as joint tenants. 4 W. 4, c. 1, s. 48.

Executors and trustees are excepted from the operation of this section, since they are appointed, and estates are vested in them by reason of personal confidence reposed in them, and it is more consistent with intention and convenience that the survivor should hold solely than in common with the representatives or devisee of the deceased tenant.

Under the former law, on a simple conveyance or devise to two or more, they took, as a general rule, as joint tenants unless an intention sufficiently appeared on the face of the instrument that they should take as tenants in common. Equity followed the law, except in the case of loan on mortgage (a), of purchase money paid in unequal proportions apparent on the face of the instrument, or with partnership funds, or in case of purchase for a joint undertaking or partnership, or marriage articles (b). By this section the former rule is reversed, and the burden of proof as to intention thrown on those who insist on a joint tenancy.

Questions can rarely arise under this section, for it seldom happens (unless in the excepted cases of trustees and executors) that there is any intention of *jus accrescendi*, and that the parties should take otherwise than as tenants in common on a conveyance on devise to two or more, and if that intention exist, it is generally (on a conveyance *inter vivos* at least), so expressed as to remove all doubts. It must be borne in mind however that though benefit of survivorship points strongly to a joint tenancy, it is not

as joint-tenants unless such intention be expressed.

Executors and trustees excepted.

By the old law on conveyance to two, they took as joint tenants unless a contrary intention appeared. So also in equity, except in certain cases.

Benefit of survivorship, or the words "as

(a) See ante, p. 84.

(b) See notes to *Morley v. Bird*, Tud. Lg. Ca. 2nd Ed. 788.

"as joint tenants" not conclusive to establish joint tenancy. conclusive even under the old law. "A tenancy in common, with benefit of survivorship is a case which may exist, without being a joint tenancy, because survivorship is not the only characteristic of a joint tenancy" (a), and it has been held that even the use of the words "as joint tenants" in a bequest of personalty is not conclusive in favor of a joint tenancy (b).

Cases in wills wherein joint tenancy inferred, as against words importing a tenancy in common. Subsequent expressions following words, which standing by themselves will confer a tenancy in common, may shew it was a testator's intention to confer an estate in joint tenancy, as by a gift over being only to take effect after the decease of the survivor of several; or after the decease, or deceases of prior legatees: but where, before the gift over, there are previous gifts for life of distinct properties, it will not be implied that survivorship was intended (c).

This closes the enquiry as to the modifications of the common law rules of descent effected by the Statute of William, of which a comprehensive view can be had by examination or the table of descents. If it be desired to consider more fully the objects of the statute, and the grounds for the changes effected by it, reference should be had to the report of the real property commissioners, on which chiefly the Imperial Legislature proceeded in passing the Imperial Act from which ours is taken.

THE PRESENT LAW OF DESCENT.

Conforms to civil law and Stat. of Distributions. The Statute of Victoria, which governs descent since the first day of January, 1852, is entirely subversive of the former system, and based on the rules of the civil law. In many respects, as hereafter pointed out, it bears a close

(a) *Doe d. Borwell v. Abey*, 1 M. & S. 428, per Bailey, J.; 2 Jarman Wills, 3rd Ed. 700. See also *Hatton v. Finch*, 4 Bea. 186; *Re Drakeley's Estate*, 19 Bea. 395; *Haddelsey v. Adams*, 22 Bea. 275; *Connec v. Taaffe*, 12 Ir. Ch. Rep. 338. See notes to *Morley v. Bird*, Tud. Lg. Ca. 2nd Ed. 798.

(b) *Booth v. Alington*, 3 Jur. N. S. 835, 27 L. J. N. S. pt. 1, 117.

(c) See notes to *Morley v. Bird*, supra. See also 2 Jar. Wills, 3rd Ed. 240 *et seq.*

resemblance to the mode of succession to personalty under the Statute of Distributions, and many of the decisions on that statute, especially as to the advancement and hotch-pot clauses, may be applicable to this statute; but in applying the cases the difference of language in the two acts hereafter pointed out must be borne in mind. This act seems to be copied almost entirely from the revised act of the State of New York, and the American decisions under that act, and of the laws of descent of some other of the States of the Union will be found to be of service. (a).

Taken from
act of New
York.

SECTION 22.

22. The following sections numbered from twenty-three to forty-nine, both included, shall apply retrospectively to the first day of January, one thousand eight hundred and fifty-two inclusive, and also prospectively, as the case may be, and shall be construed as if the same had been passed on the said first day of January, one thousand eight hundred and fifty-two. 14, 15 Vic., c. 6, s. 1.

Descents since
the 1st Janu-
ary, 1852.

The statute came into force on 1st Jan., 1852, which fact explains this section.

SECTION 23.

23. Whenever on or after the first day of January, in the year of our Lord one thousand eight hundred and fifty-two, any person shall die, seised in the fee simple or for the life of another of any real estate in Upper Canada, without having lawfully devised the same, such real estate shall descend or pass by way of succession in manner following, that is to say :—

How real es-
tate of an in-
testate dying
after 1st Janu-
ary, 1852,
shall descend.

Firstly—To his lineal descendants, and those claiming by or under them, *per stirpes* ;

(a) The author regrets that he has had but limited means of availing himself of the sources of information referred to in the text; the American Reports at Osgoode Hall are far from being complete, or of recent date, and the only American text writers on the law of descent are Mr. Chancellor Kent and Mr. Washburn, both of whom treat of the subject in a very cursory way in their Commentaries on the Law of Real Property. The present Act of New York is, as far as the author can ascertain, in the first Vol. of the Revised Acts of New York, p. 751, and to be found at Osgoode Hall in the edition of Denio and Tracey, Vol. 2, p. 157. A short sketch of the various laws of descent in the different States is given by Mr. Washburn.

Secondly—To his father ;

Thirdly—To his mother ; and

Fourthly—To his collateral relatives ;

Subject in all cases to the rules and regulations hereinafter prescribed. 14, 15 Vic. c. 6, s. 1.

Stat includes estates in fee simple, *pur autre vie*, but not estates tail or estates held in trust.

It is to be observed that this section expressly includes estates *pur autre vie*, and does not include estates-tail: the descent of the latter are governed therefore, as presently explained, *per formam doni*. Moreover if the legal estate is vested in a trustee, then by sec. 41 this act does not apply to affect the descent of the legal estate, though by sec. 50 the equitable interest of the *cestui qui trust* will descend according to its provisions: the reference to the "fortieth" section in sec. 50, is a misprint for "forty-first." Sections 50, 51 & 52, should be referred to before considering other sections.

No longer trace from purchaser. Do we revert to com. law rule of tracing from person last actually seised?

Descent is no longer as under the Statute of William to be traced from the purchaser, or person last entitled; but the language of sec. 23 is, that the real estate of any person who shall die intestate, *seised* in fee-simple, or for the life of another, shall descend, &c. The first question which suggests itself on the language of this section is, whether we are again referred to the rigorous common law rule, which was, that the descent should be traced from the person *last actually seised*, and that a mere seisin in law did not suffice to constitute a good root of descent, a seisin in deed, or its equivalent, being requisite. Thus in a case put before, of A, a bastard dying seised, leaving his wife and wife's brother, and B his son and heir at law, him surviving; assume that B never was seised, and died intestate: here, at common law, as descent had to be traced from A as last seised, the wife's relations could never take, and the estate would escheat; but had B entered, then his mother's collateral relative might have taken as heir to her son. Under the Statute of William, in such case there must always have been an escheat, even though B had entered, on its being shown that he inherited, and that A

According as descent is traced from person last seised or person last entitled will the person who is to take as heir be varied—instances.

was the purchaser (a). The hardship in this instance was never removed here, but a remedy was applied in England by 22 & 23 Vic. ch. 35, sec. 19.

In such a case, under the Statute of Victoria, the question would be whether the mother could take under the latter part of sec. 28 as heir to B; or whether, as B never acquired seisin, descent would have to be traced from A as the *stirps*, and so escheat; for it is apprehended that in such a case the mother could not take under sec. 37, which is confined to the next of kin to A under the statute of distributions.

Again suppose A., the purchaser, seised in fee, to grant a life estate and die seised of the reversion in fee, leaving his son B, his father C, and wife D him surviving: here the reversion would descend to the son B; but if he, B, died pending the life estate, (in which case, as before explained (b) he would not at common law, for the purposes of descent, have acquired actual seisin,) the question would be, under the Statute of Victoria, whether when the estate in reversion became one in possession on the death of the life tenant, the parties claiming must take A or B as the *stirps* of descent. If A be taken, then the estate will go to A's father, under the first part of sec. 27; if B be taken, it will go to the mother of B under sec. 28, and not to his grandfather.

A consideration of the above, and other cases put before, will show the importance of the question. Sec. 23, as regards this point, appears to be worded much as the statute of the State of New York of 1786. Mr. Chancellor Kent, in reference to that statute, says (c), "The rule of the common law existed in New York under the statute of descents of 1786, and the heir was to deduce his title from the person dying seised. It had been repeatedly held, that during the existence of a life estate, the heir on whom the reversion or remainder was cast, subject to the life

New York St.
much as this.

Decision on.

(a) Doe Blackburn v. Blackburn, 1 Moo. and R., 547, per. Parke, B., ante p. 152. (b) Ante p. 127. (c) Vol. 4, ed. 11, p. 388.

estate, was not so seised as to constitute him the *possessor fratri* or the *stirps* of descent if he die pending the life estate, and the person claiming as heir, must claim from a previous ancestor last actually seised. If the estate in fee had been acquired by *descent*, it was necessary that there should have been an entry to gain a seisin *in deed* to enable the owner to transmit it to his heir; and therefore, if the heir on whom the inheritance had been cast by descent died before entry, his ancestor, and not himself became the person last seised, and from whom the title as heir was to be deduced; but the New York revised statutes have wisely altered the pre-existing law on this subject."

The wording of the New York *revised* statute is: "The real estate of every person who shall die without devising the same shall descend," &c. And by the interpretation, clause the term "real estate" includes every estate, interest, or right: our statute has adopted this interpretation clause (sec. 50), by which the term "real estate" is to include every estate, interest, and right, legal and equitable, held otherwise than in trust in fee simple, or for the life of another. We have however, still retained the word *seised* in sec. 23, which is struck out in the revised Statute of New York.

The word
seised identical
with *entitled* to
for purposes of
descent.

There can be little doubt that by virtue of the comprehensive meaning given to the words "real estate," actual seisin is not requisite, and that the word *seised* in section 23, will be construed as *entitled to* (a); for the word *seisin*, in its strict sense, is inappropriate to many rights, interests and estates, which are to descend, and would therefore receive a wider signification appropriate to such rights: moreover by section 8 proof of entry by the heir is dispensed with: still there are no decisions in our courts; our statute differs as explained above from the American; and that is sometimes taken as law in the courts of the various States which would not be so taken here. Mr. Washburn (b), after stating the rule at common law as to descent of an

(a) Washburn *Bl. Prop.*, Vol. 2, 2nd ed. pp. 405, 410.

(b) Washburn *Bl. Prop.*, Vol. 2, 2nd ed., p. 405.

estate in remainder or reversion dependent on a freehold estate to be as before expressed (a), says *in reference to such an estate*, "the law is changed in several, if not all the United States, and the heirs of a reversioner or remainder-man take as absolutely as if their ancestors were actually seised of a freehold in possession, the word *seised* being equivalent to *owning* when applied to such an interest; a remainder-man or reversioner, therefore, becomes a proper stock of descent, &c.;" and he refers to cases in support of this, decided under the Statute of 1786 above-named. If seisin in law, or mere right of ownership, suffices under the Statute of Victoria to constitute a good *stirps* of descent, as would seem to be the case, then it is similar in its effect to the Statute of William, by which descent is to be traced from the person last entitled; the only difference being that under the Statute of Victoria you cannot shift the trace of descent from the person last entitled by shewing that he inherited, as you can under the Statute of William.

The wording of the 23rd section requires explanation, as it is somewhat calculated to mislead. It enacts that the estate shall descend to the lineal descendants of the person last seized, and those claiming under them, *per stirpes*: Descent per capita, not per stirpes prevails, following the civil law. now this expression at the outset would lead to the inference that the common law rule of succession *per stirpes* was to be the prevailing feature in the statute, whereas it is just the reverse; and it is the civil law rule of succession *per capita* that prevails, and descent *per stirpes* only takes place as an exceptional case, as will be seen in the sequel.

SECTIONS 24, 25 & 26.

24. If the intestate shall leave several descendants in the direct line of lineal descent, and all of equal degree of consanguinity to such intestate, the inheritance shall descend to such persons in equal parts. however remote from the intestate the common degree of consanguinity may be. 14, 15 V. c. 6, s. 2. As to descendants in equal degrees of consanguinity.

(a) Ante p. 127.

If some children be living and others dead leaving issue.

25. If any one or more of the children of such intestate be living, and any one or more be dead, the inheritance shall descend to the children who are living, and to the descendants of such children as have died, so that each child who shall be living shall inherit such share as would have descended to him if all the children of the intestate who have died leaving issue, had been living; and so that the descendants of each child who shall be dead shall inherit in equal shares the share which their parent would have received if living. 14, 15 V. c. 6, s. 3.

Same rule as to other descendants in unequal degrees of consanguinity.

26. The rule of descent prescribed in the last preceding section shall apply in every case where the descendants of the intestate, entitled to share in the inheritance, shall be of unequal degrees of consanguinity to the intestate, so that those who are in the nearest degree of consanguinity shall take the shares which would have descended to them, had all the descendants in the same degree of consanguinity who have died leaving issue, been living, and so that the issue of the descendants who have died, shall respectively take the shares which their parents if living would have received. 14, 15 V. c. 6, s. 4.

S. 24 expressly introduces descent *per capita* to the exclusion of the former system of descent *per stirpes*. Thus A dies seised, having had two daughters, both dead, in A's lifetime; one of which daughters left one son, and the other eleven sons: here instead of the one grandson taking one half, as would be the case tracing descent *per stirpes* (by force of the 4th canon), he will only take equally with the others, viz., one-twelfth. But it will be observed this rule only applies when all taking are of equal degrees of consanguinity: otherwise under section 25, if in the above case, the mother of the one son had been alive on the death of A, and the mother of the eleven sons dead; here as the descendants of A are in unequal degrees of consanguinity, the mother living will take one half, and the eleven sons of the mother dead the other half between them all: the descent is partially *per stirpes* and partially *per capita*; it is *per stirpes* as between the daughter living and the eleven sons of the daughter dead, but it is *per capita* as between such eleven sons among themselves.

but if some heirs be in equal and others in unequal degrees, then under s. 25 descent partly *per stirpes*, partly *per capita*.

Section 24 expressly introduces descent *per capita* to the exclusion of the former system of descent *per stirpes*. Thus A dies seised, having had two daughters, both dead, in A's lifetime; one of which daughters left one son, and the other eleven sons: here instead of the one grandson taking one half, as would be the case tracing descent *per stirpes* (by force of the 4th canon), he will only take equally with the others, viz., one-twelfth. But it will be observed this rule only applies when all taking are of equal degrees of consanguinity: otherwise under section 25, if in the above case, the mother of the one son had been alive on the death of A, and the mother of the eleven sons dead; here as the descendants of A are in unequal degrees of consanguinity, the mother living will take one half, and the eleven sons of the mother dead the other half between them all: the descent is partially *per stirpes* and partially *per capita*; it is *per stirpes* as between the daughter living and the eleven sons of the daughter dead, but it is *per capita* as between such eleven sons among themselves.

This mixed system of descent *per stirpes* or *per capita* according as the parties entitled are in equal or unequal degrees of consanguinity to the intestate is not confined to this section, and will be found to pervade the act. Inheritance *per stirpes* is admitted when representation becomes necessary to prevent the exclusion of persons in a remoter degree, as for instance when there is left a son, and children of a deceased son, but when all are in equal degree, as grandchildren, representation becomes unnecessary, and would occasion an unequal distribution, and all take *per capita* (a).

Take the following case in further illustration of this Illustration of
s. 25.
25th section; assume that A has three children, B, C, and D; that C and D die in the lifetime of A, C leaving two children and D four children, and then A dies seised, intestate: here B, the surviving child, will take one-third, being "such share as would have descended to him (by section 24) if all the children of the intestate who have died leaving issue, had been living; "the two grandchildren, issue of C, will take *per stirpes quoad* their ancestor, viz., one-third, which they will divide *per capita* between themselves, and each take half a third or sixth: and the four grandchildren, issue of D, will take in the same way, *per stirpes*, their ancestors share one-third, which they will divide between them *per capita*, and each take a fourth of a third, or a twelfth; and this because "the descendants of each child (of the intestate) who shall be dead, shall inherit in equal shares the share which their parent would have received if living." The 25th section applies only "if any one or more of the *children* of the intestate be living," and not where none are living, but have left descendants in unequal degrees: the latter case is reached by the 26th section, and by it the rule prescribed by section 25 "shall apply in every case where the *descendants* entitled to share shall be of unequal degrees, &c.;" thus if in the case

(a) As to descent *per stirpes* and *per capita*, and the grounds on which they severally rest, see Vinnius on the Institutes, lib. 3, tit. 1, n. 6.

last put, B, C, and D, had been grand-children, instead of children of A. (their parents being dead); section 25 would not have applied to meet the case, as no *children* of the intestate would have been living on the death of the intestate; but by the combined action of sections 25 and 26, the estate would go as above stated. It will be seen hereafter that a posthumous child is to be considered as *in esse*: that, except in certain cases, the half-blood take equally with the whole blood in the same degree: and that a child who has been advanced shall bring, before participating, his advancement into hotch-pot.

The half blood
and hotch pot.

Analogy in
the above to
right under
St. of Distri-
butions.

The course of descent, as above mentioned, is the same as the rule of succession to personal property prescribed by the Statute of Distributions of Charles, under like circumstances, *i. e.*, where an intestate dies leaving lineal descendants and no widow; and even if there be a widow, the Statute of Victoria, section 41, expressly reserves the widow's right to dower, which would be one-third for life, whilst the Statute of Distributions gives her one-third absolutely.

SECTION 52.

Interpretation
as to sections
23 to 50.

52. Whenever in any of the said twenty-eight sections the expressions "where the estate shall have come to the intestate on the part 'of the father,' or 'mother,'" as the case may be, are used, the same shall be construed to include every case where the inheritance shall have come to the intestate by devise, gift or descent from the parent referred to, or from any relative of the blood of such parent. 14, 15 Vic. c. 6, s. 27.

This section is taken out of its order, inasmuch as the prior 27th, 32nd, 34th, 35th & 36th sections cannot be understood without appreciation of it. The prior sections speak of the estate "coming to the intestate on the part of his father," or "mother," as the case may be, and send the descent towards the paternal or maternal line accordingly, preserving a relict of the preference given by the prior law to the blood of the purchaser: section 52 defines what is meant by the expression in the prior sections of "the estate

coming to the intestate on the part of his father," or mother, as including "devise, gift, or descent from the parents referred to, or from any relative of the blood of such parents." It will be observed this section considerably alters and enlarges the mode by which under the Statute of William, a person was considered as taking an estate *ex parte materna*, or *paterna*, as the case might be: he was before considered as so taking, in those cases *only* where he took by descent, tracing from the paternal or maternal ancestor as the purchaser; but if (at least after the Statute of William) he took by gift or devise from such ancestor, then the estate was not considered as descending to him at all, but he took as purchaser (a), and parties claiming on his death had to make themselves heirs to him as the purchaser, and to no one else, and if they could not, the estate would escheat. The change effected in the Statute by Victoria is very great, as will be seen by considering one simple and common case: suppose that in the second table of descents, the estate had been either devised, or given to John Stiles, by his mother, or any relative of hers; here under the statute of William, John Stiles would have been considered not as taking *ex parte materna* at all, but as a purchaser; and the result was that all the paternal ancestors and their descendants, however remote, must have failed before any maternal ancestor, or any one claiming through such could have taken. Now however in such a case, the estate is to be considered as having descended *ex parte materna*, and the paternal line are excluded: except only that if the mother be dead, and there be any brothers or sisters of the intestate, or any of their descendants, the father will take a life estate; or if the mother be dead, and there be no brothers or sisters of the intestate, or their descendants, then the estate will go to the father; and paternal are postponed to maternal uncles and aunts.

Alters and extends former mode and sense of taking by purchase.

Instance of change as to taking by purchase effected by Stat. Vic.

Questions may arise as to the construction of sec. 52, in those cases where the intestate has taken from some person on the paternal or maternal side, who in turn has

(a) See p. 144.

Case of the intestate having taken from a paternal relative, who has taken from a maternal relative.

taken from the other side, and the question would be which side would have preference in distribution of the inheritance. Thus, the intestate has acquired the estate by devise, gift or descent, from his mother, who acquired it in either of those modes from her husband, the father of the intestate: the only relatives are brothers and sisters of the mother, and brothers and sisters of the father, and under ss. 32 and 34, either side will take to the exclusion of the other, according to whether the inheritance is to be considered as come to the intestate on the part of his father, or of his mother. Again, if in the case above supposed there were brothers of the half-blood of the intestate on his father's side, would the half-blood be excluded under sec. 36; in which section however the words "ancestors" is made use of. Many other instances might be put under the various sections, (a) but the above will serve to elucidate the question. It is apprehended on the language and construction of the act and the American decisions (b) that in such cases the person from whom the intestate immediately takes is the *propositus* who alone will be regarded, and that you cannot change this by showing how the estate was acquired, as you can in cases of inheritance under section 4 of the Statute of William. Thus where an intestate had inherited from his brother, who had inherited from his father, and the intestate left no descendants, ancestors, or brothers or sisters, it was held on the New York act and the sections therein corresponding to ss. 52, 35 and 32, that relatives on the side of the mother of the intestate were not excluded in favour of those on the side of the father (c).

A further question is whether where the intestate has acquired an ancestral estate by gift devise or descent coming under section 52, alienation by him, which under the old law would have made him a new stock of descent, and also a purchaser, and deprived the estate of its former hereditary

(a). See remarks under s. 36.

(b). *Curren v. Taylor*. 19 Ohio 36; *Gardner v. Collins* 2 Peters 58, Supreme Court; *Hyatt v. Pugsley*. 33 Barb. 373; *Prickett v. Parker*, 3 Ohio St. 394.

(c). *Hyatt v. Pugsley*, *supra*.

qualities on the paternal or maternal side (a) will equally operate under this act to cause all consideration of the estate being ancestral to be rejected (b). This question may arise in various shapes: thus if the intestate had sold the estate, there can be no doubt that the proceeds, though earmarked, would go as personal estate under the Statute of Distributions. If the proceeds were laid out in other real estate, this would have no ancestral quality in it, and under no circumstances would there be a preference to ancestral paternal or maternal side. It would seem to follow, especially on applying the former law (c), that the result would be the same if the intestate had conveyed to some one, and forthwith, or at any time afterwards, obtained a re-conveyance: and consequently that there would be the same result if the estate re-vested through the medium of the Statute of Uses, as on conveyance by the intestate to a grantee to uses to his own use. If, however, the intestate should not have made disposition of his entire interest, but merely of a portion, leaving a reversion to come by act of law to himself and his heirs, it is apprehended this reversion would be imbued with the former qualities of the estate.

The meaning of blood relationship and of the words "of the blood of," is considered in treating of sec. 36.

SECTION 27.

27. In case the intestate dies without lawful descendants, and leaving a father, then the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and such mother be living; and if such mother be dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relatives hereinafter provided; and if there be no such brothers or sisters, or their descendants, living, such inheritance shall descend to the father. 14, 15 Vic., c. 6, s. 5.

If the intestate leave no descendants, rights of father, mother, &c.

(a) Ante pp. 127, 152, 153.

(b) On this head see the American cases, *Champlin v. Baldwin*, 1 Paige 561.

(c) See last note.

S. 27. if no descendants, the father takes, unless inheritance came on the part of the mother, &c.

Meaning of expression "if the inheritance come to intestate on the part of his mother and the mother be living."

Instance of operation of s. 27.

The first clause provides that if the intestate die without descendants, the inheritance shall go to the father, if living, unless the inheritance came to intestate on the part of the mother, and the mother be living; what shall be the descent in the latter event, if the mother be living, is provided for not by this section, but by sec. 28.

First however should be explained what is meant by the expression in this section as to the inheritance coming to the intestate on the part of his mother, *and the mother being living*. Taking the word *inheritance* in the sense in which in reference to descents it is frequently used (as in the 7th common law canon), as referring to or as synonymous with, course of descent, or the descent itself, instead of the subject matter thereof, it is difficult to understand how an inheritance as such can come to a child as from a living mother. Mr. Justice Blackstone and others express the 7th common law canon thus: "In collateral inheritances, the male stocks shall be preferred to the female, unless the *lands* have descended from a female;" in sec. 27, the word *inheritance* is not used in the sense in which it is used in the 7th canon, but in the sense in which the word *lands* is there made use of; for the 50th section declares that the word *inheritance* shall be understood to mean in the prior twenty-seven sections, "*real estate*;" and the 52nd section declares, that the words "where the estate shall have come to the intestate on the part of the father or mother," shall be "construed, to include every case in which the *inheritance* shall have come to the intestate by devise, gift, or descent, from the parent referred to, *or any relation of the blood of the parent*" (a).

This section may perhaps be best explained by illustrating it by the table of descents. Thus assume John Stiles to be actually a purchaser for money; (*for money* is said, because the 52nd section, as above explained, has altered the meaning and implication of the word *purchaser*,

(a) See as to blood relationship under American acts, and that a father is within the meaning of the act of the blood of a child, *Cole v. Batley*, 2 Curtis, C. C. 562. See also remarks under sec. 36 and sec. 52.

as formerly understood, by excluding from it the case of a man taking by gift or devise from some relative on the father's or mother's side;) in such case, on John's death without issue, the father if living, would take under the first clause. The case of the inheritance coming *ex parte materna*, and the mother being *living*, is provided for in the 28th section, and that therefore is passed for the present, and the next clause proceeded to, viz., the like case of inheritance *ex parte materna*, and the mother being *dead*, and the father Geoffrey, living, and also the brothers and sisters of intestate of the whole blood, Francis, Oliver, Bridget, and Alice : here the father would take a life estate, and the reversion would go equally among the brothers and sisters. If also at the time of death of John, his half-brothers and sisters *ex parte materna* had been alive, Nos. 38 and 39, and also his half-brothers and sisters *ex parte paterna*, Nos. 8, 9 and 9 then, under the 36th section, the half-blood *ex parte materna* would have been entitled equally *per capita* with the brothers and sisters of the whole blood. The half-blood *ex parte paterna* would not have taken, if the estate came from a *maternal ancestor* : descendants of any brothers and sisters deceased would have taken *per capita* and *per stirpes*, as the case might be, as explained in the 30th section.

Under the last clause of the 27th section, if the estate came on the part of the mother (*a*), and the mother, brothers and sisters of John, and the descendants of such brothers and sisters were dead, then the estate would go to the father, Geoffrey. This latter again varies from the Stat. 4 Wm. IV., under which in case the estate really did descend *ex parte materna*, that is, by descent to John, from Lucy his mother, it would not go in fee to the father, but to Andrew Baker, the father of Lucy, John Stiles' mother, subject to the tenancy by the curtesy of John's father, Geoffrey.

This 27th section varies from the Statute of Distributions in this; that failing lineal descendants, personalty

S. 27. Last clause, if estate came *ex parte materna*, and mother, brothers and sisters and descendants dead, the father takes.

Varies from St. of Distributions.

(a) See s. 52, and ante p. 162.

goes, one-half absolutely to the widow, and the other half to the father; whereas under this statute, the father takes all absolutely, subject to the widow's right to one-third for life, as dowress. If there be no widow, the father as being in the first degree, takes all personal estate absolutely, without regard to how the intestate acquired it; such regard is had, however in the case of realty, for if it came to the intestate on the maternal side, the father only takes a life-estate.

SECTION 28.

If there be no father entitled to inherit.

28. If the intestate shall die without descendants and leaving no father, or leaving a father not entitled to take the inheritance under the last preceding section, and leaving a mother and a brother or sister, or the descendant of a brother or sister, then the inheritance shall descend to the mother during her life, and the reversion to such brother or sister of the intestate as may be living, and the descendants of such as may be dead, according to the same law of inheritance hereinafter provided; and if the intestate in such case leaves no brother or sister, nor any descendant of any brother or sister, the inheritance shall descend to the mother. 14, 15 Vic. c. 6, s. 6.

If no descendants and no father who can take, but a mother, brother and sister.

This section is somewhat explained by what has been said in reference to the 27th. This section provides for the case of the father being dead, who otherwise would be entitled to take the inheritance; and also for the case of his being alive, and yet not entitled to take under sec. 27, by reason of the estate coming *ex parte materna*, and the mother or collateral relatives being alive. Thus assume that on John's death his father Geoffrey was either dead, or not entitled to take as above mentioned, and that the mother of John, and his brothers and sisters, Francis, Oliver, Bridget, and Alice, were alive: the mother would take for life, and the brothers and sisters *per capita*, and descendants of deceased brothers and sisters would take as provided for in the 30th section. If the brothers and sisters, and their descendants, were dead, then the estate would go to the mother. It should be mentioned that all the brothers and sisters of the half-blood would take equally with those of

the whole blood under the 36th section; that is, if John were purchaser for money, all the half blood *ex parte paterna* and *materna*, viz., Nos. 8, 9 and 9, and 38, 39, 39, would take equally with the brothers and sisters of the whole blood: but if John got the estate *ex parte paterna* or *materna*, then the half-blood only on that side, would take.

Under the Stat. 1 James II., ch. 17, s. 7, the personality of an intestate who leaves no father, wife, or children, will go in equal shares between his mother and brothers and sisters: the above section is on much the same principle, except that the mother takes only a life-estate in all.

The right to personality in like case.

SECTIONS 29, 30, 31.

29. If there be no father or mother capable of inheriting the estate, it shall descend in the cases hereinafter specified to the collateral relatives of the intestate; and if there be several of such relatives, all of equal degree of consanguinity to the intestate, the inheritance shall descend to them in equal parts, however remote from the intestate the common degree of consanguinity may be. 14, 15 Vic. c. 6, s. 7.

And if there be neither father nor mother.

30. If all the brothers and sisters of the intestate be living, the inheritance shall descend to such brothers and sisters; and if any one or more of them be living and any one or more be dead, then to the brothers and sisters and every of them who are living, and to the descendants of such brothers and sisters as have died, so that each brother or sister who may be living, shall inherit such share as would have descended to him or her, if all the brothers or sisters of the intestate who have died leaving issue had been living, and so that such descendants shall inherit in equal shares the share which their parent, if living, would have received. 14, 15 Vic. c. 6, s. 8.

Succession of brothers and sisters and their descendants.

31. The same law of inheritance prescribed in the last section shall prevail as to the other direct lineal descendants of every brother and sister of the intestate, to the remotest degree, whenever such descendants are of unequal degrees. 14, 15 Vic. c. 6, s. 9.

As to such descendants in unequal degrees.

These sections assume there are no lineal descendants, father, or mother, and provide for cases of descent to

In cases where no issue or parents living.

collaterals
take.

collateral relatives, as brothers, sisters, and their descendants, as next entitled, and the mode in which they shall take. The mode of taking hereby presented as regards taking *per stirpes* or *per capita* is somewhat similar to that presented under sections 24, 25, and 26 in reference to children of intestate and their descendants.

This section if unrestrained by subsequent sections would admit equally all collateral relatives of equal degrees of consanguinity to the intestate, and allow therefore uncles and aunts to share with nephews and nieces, if those classes were the only relatives on death of the intestate. Subsequent sections control and explain this section however. The principle on which they proceed is, that collateral kindred claiming through the nearest ancestor, are to be preferred to collateral kindred claiming through a common ancestor more remote. The claim of the nephew is through the father of the intestate, that of the uncle through the grandfather.

Husband and
wife may each
share.

The unity in law of husband and wife will not it is apprehended, prevent each taking the several portions they would respectively have been entitled to if unmarried. Thus if a nephew of the intestate, son of his deceased brother, should intermarry with his cousin, daughter of another deceased brother, niece of the intestate, and there should be other nephews and nieces, the husband and wife will each take a share (a). The same principle applies under section 35, as to uncles and aunts.

Instance of
descent under
these secs.

An illustration of the mode of descent under these sections may be made thus: assume John to have died, leaving him surviving only his brother Francis; and A, and B, two sons of his brother Oliver; and D, and E, two grandsons of Oliver by a deceased son of his, C. Here all the claimants are collateral relatives of unequal degrees of consanguinity to intestate, being one brother, two nephews, and two grand-nephews; and a mixed descent, *per stirpes* and *per capita* takes place; *per stirpes* in dividing between

(a) Knapp v. Windsor, 6 Cush, 156.

the unequal degrees, *per capita* between the equal degrees. Thus A and B between themselves shall take equally, so also shall D and E; but taking A and B together as of *one class*, and D and E together as of *another class*, they take unequally as being of unequal degrees of consanguinity to intestate. The result of the above is that Francis takes one-half; A and B two-thirds, or each one-third of another half; and D and E one-third, or each one-sixth of such half; in other words, Francis six-twelfths, A and B each two-twelfths, and D and E each one-twelfth.

The mode of descent prescribed by these sections agrees somewhat with the prior law, except that under the latter the eldest brother and his lineal descendants took by the law of primogeniture to the exclusion of younger brothers and their descendants, and it was only among females that equal division took place; and the half-blood were not admitted as favourably as now by section 36. It agrees also with the Statute of Distributions with these exceptions; 1st. That as to personalty, the widow, if any, will take a moiety absolutely, and the residue go to the brothers and sisters; whilst as to realty, the brothers and sisters now take all, subject to the right of dower of the widow, viz., one-third for life; 2nd. Under that statute the right of representation is confined to *children*, and under the Statute of Victoria extended to *descendants* of the brothers and sisters deceased, of the intestate. Both statutes also postpone grandfather and grandmother to brothers and sisters, though all are in equal degree.

Comparison
with old law,
and Statute of
Distributions.

SECTION 32.

32 If there be no heir entitled to take under any of the preceding ten sections, the inheritance, if the same shall have come to the intestate on the part of his father, shall descend :

If there be no
heir under the
preceding
sections.

Firstly.—To the brothers and sisters of the father of the intestate in equal shares, if all be living;

Secondly.—If one or more be living, and one or more have died leaving issue, then to such brothers and sisters as are living, and to the descendants of such of the said brothers and sisters as have died, in equal shares;

Thirdly,—If all such brothers and sisters have died, then to their descendants; and in all such cases the inheritance shall descend in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate. 14, 15 Vic. c. 6, s. 10.

When no descendants, father, mother, brothers or sisters, or their descendants, and estate came *ex parte paterna*, uncles and aunts *ex parte paterna* take.

This section provides for cases previously unprovided for, viz, cases in which the intestate leaves no issue or father, mother, brother or sister, or their descendants, and assumes the estate to have come *ex parte paterna*. In such case, under the Statute of William, the estate would have gone to George Stiles, the grandfather; and at common law would have gone, not to George, but to his children, viz, the brothers and sisters of the father of the intestate, (No. 11,) by primogeniture. The present section adheres to the preference formerly given to the blood of the purchaser, and sends the estate also in the same way as the common law, except that it does not go by primogeniture, but to all equally. Under the second clause of this section it will be seen, that it does not very distinctly appear whether the descendants of such brothers or sisters as are dead take, *per stirpes* or *per capita*, with the surviving brothers and sisters; it would seem however, that by force of clause 3 they would take *per stirpes* or *per capita* according to the degrees of consanguinity, in the same manner as before explained in regard to children or brothers of the intestate, and their descendants.

Comparison with Stat. of Distributions.

This section, and those following vary in principle from the course of succession under the Statute of Distributions, under which the grandfather or grandmother would exclude the uncles and aunts, the latter being in the third and the former in the second degree to intestate (a). The Statute of Victoria, however, postpones all lineal ancestors beyond the father and mother, (unless, indeed, they can take under section 37); and in preference to a grandfather or grandmother, will give the estate to even a remote descendant of an uncle or aunt; a variance from the law of personality, which appears at first sight somewhat harsh, but may be

(a) Ante pp. 117, 134.

justified on the ground taken by Lord Hardwicke (a), "that it would be a great inconvenience to carry the portions of children to a grandfather, who must be supposed to have been provided for, and may probably be in a dying condition and not want it; and it would be contrary to the very nature of provisions among children, as every child may be said to have *spes accrescendi*." The case before Lord Hardwicke was, it is true, a case wherein the contest was between a grandfather and a brother of an intestate, both of whom by the civil law mode of computation are in equal degree to the intestate, and therefore in strictness entitled to equal shares; still the reasoning applies to uphold the equity of this section, and there can be little object and much inconvenience in giving the estate for a probably brief period, to an infirm and aged grandsire whose wants and capacity to enjoy may be small, and on whose death the estate might shortly have to be submitted to another descent.

SECTION 33.

33. If there be no brothers or sisters, or any of them, of the father of the intestate, and no descendants of such brothers or sisters, then the inheritance shall descend to the brothers and sisters of the mother of the intestate, and to the descendants of such of the said brothers and sisters as have died, or if all have died, then to their descendants, in the same manner as if all such brothers and sisters had been the brothers and sisters of the father. Further provision.
14, 15 V c. 6, s. 11.

This section provides for cases not before provided for, viz., the case of no lineal descendants, father, mother, brother, sister, or uncles or aunts, *ex parte paterna*, or their descendants, and the estate coming *ex parte paterna*; in such case the estate is to go to the uncles and aunts *ex parte materna* and their descendants, as if they had been uncles and aunts *ex parte paterna*. Thus, the issue of Andrew and Esther Baker (No 41) would take. This is a great infringement on the prior law, for under it those claiming

Failing paternal uncles and aunts and their descendants, the maternal take in cases of ancestral paternal estate.

(a) 3 Atk. 762.

ex parte materna could never take till the whole paternal line were exhausted.

SECTION 34.

Farther provision if the estate came by the mother's side.

34. In all cases not provided for by the twelve next preceding sections, where the inheritance shall have come to the intestate on the part of his mother, the same, instead of descending to the brothers and sisters of the intestate's father, and their descendants, as prescribed in the preceding thirty-second section, shall descend to the brothers and sisters of the intestate's mother, and to their descendants, as directed in the last preceding section; and if there be no such brothers and sisters or descendants of them, then such inheritance shall descend to the brothers and sisters, and their descendants, of the intestate's father, as before prescribed. 14, 15 V. c. 6, s. 12.

Estate coming *ex parte materna*, maternal uncles, &c., take before paternal.

Section 34 provides for failure of lineal descendants, of father and mother, of brothers and sisters and their descendants, where the estate comes *ex parte materna*. This is the same as provided for under the 32nd and 33rd sections, except that under those the estate is assumed to come *ex parte paterna*. The descent under the 34th section, is governed by the same principle as under the 32nd and 33rd, but as the estate comes *ex parte materna*, it goes first to uncles and aunts on the maternal side and their descendants, and if none, then to uncles and aunts on the paternal side and their descendants, *per stirpes* or *per capita*, on the principles before mentioned, according as the heirs are or are not in equal degrees of consanguinity.

SECTION 35.

If it came neither on father's nor mother's side.

35. In cases where the inheritance has not come to the intestate on the part of either the father or the mother, the inheritance shall descend to the brothers and sisters both of the father and mother of the intestate in equal shares, and to their descendants, in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate. 14, 15, V. c. 6, s. 13.

If estate came neither *ex parte paterna*

Under the 35th section if the estate came neither *ex parte paterna* or *materna*, as if the intestate were a purchaser

for money, or by gift from no relative, then no preference is given on either side, but the uncles and aunts and their descendants on both sides take together: the descendants taking *per stirpes* or *per capita* as the case may be: a further infringement on the prior law which would have postponed the maternal relatives.

or *materna*, then no preference given to collaterals on either side.

Before leaving the right of inheritance of uncles and aunts, it may be remarked that they are placed by this statute, in one respect, in a more favorable position than under the Statute of Distributions; for under the latter they are, as in the third degree, postponed to grandfathers and grandmothers who are in the second degree. On the other hand the Statute of Victoria postpones them to brothers and sisters of the intestate and their *descendants*, whilst as to personalty they take equally with nephews and nieces of the intestate, as being in the same degree.

Right under Stat. of Distributions.

SECTION 36.

36. Relatives of the half blood shall inherit equally with those of the whole blood in the same degree, and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors; in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance. 14, 15, V. c. 6, s. 14.

Half-blood to succeed with whole blood, unless estate came from ancestor.

In reference to section 36, it will be observed that if the intestate were the purchaser (in the strict sense of the word), relatives of the half-blood, both on the paternal and maternal side would take equally with relatives of the whole blood in the same degree. This was a double infringement on the prior law, since as before explained, under it where the intestate was purchaser, the relatives of the half-blood on the mother's side were postponed till failure of all the male paternal and female paternal ancestors and their descendants; and those of the half-blood on the paternal side were admitted only after failure of those of the same degree of the whole blood and their descendants: but under section 36 if the intestate were purchaser, and had brethren of the

half-blood on the father's and mother's side, and a brother of the whole-blood, the latter would only share equally with all the others. This accords with the Statute of Distributions, under which also no distinction is made as to how the intestate acquired the property.

But if estate came from an ancestor, the half-blood not on that side excluded.

If however the estate came to the intestate by descent, devise, or gift, *from some one of his ancestors*, then those who are not of the blood of such ancestor, are to be excluded from the inheritance; which latter rule would seem to be somewhat harsh in a case, for instance, where the next heirs would be very remote. And here also it may be remarked that this section is not worded as the other sections are when alluding to estates *ex parte paterna* or *materna*, as the case may be, "when the estate shall have come to the intestate on the part of the father," &c., which would include, by force of the 52nd section, *any gift or devise from any RELATIVE* of the blood of the father or mother, but the section refers only to the estate coming from *an ancestor*, and is not touched by section 52.

Only refers to estate coming from an ancestor, not from collateral relative of ancestor, as other sections do.

Sense of word ancestor.

In the United States, however, it has been held that the word "ancestor" is not to be construed in its strict sense, and that a younger brother may be the ancestor of his elder brother. Thus E P purchased certain lands, and died intestate, leaving I P and J P his sons and heirs, and R, his widow, married again. Before birth of issue of the second marriage, I P died intestate, and without issue; J P inherited to him and afterwards died intestate without issue. At the time of his death there was issue of the second marriage. It was held that I P was the ancestor of J P, and that on death of J P his half-brother took the moiety descended from I P (a). It must be observed, however, that this decision was not on such sections as the 36th and 52nd, which have in them the difference of language above pointed out, but on a clause regulating descent in general terms, as in section 23, and the language was, "when any person shall die intestate having title, &c., which title

(a) Prickett v. Parker, 3 Ohio, 394.

shall have come to the intestate by descent, devise, or gift from any ancestor, such estate shall descend, &c."

There is in the latter part of this section a mistake in referring to ancestors in the plural. The American Statutes refer only to the ancestor from whom the estate has come, and whose blood is requisite in the half-blood seeking to inherit. It is manifest that the following observations of a learned American judge (whose able judgment on a statute very similar to this is worthy of great consideration), apply with additional force where ancestors generally are referred to, instead of (as in the case before him) the particular ancestor from whom the estate has come. He says (a): "Soaring on the wings of fancy, remembering only that all mankind are descended from the same common parents, with the aid of genealogical tables sufficiently extensive, and of a herald who is master of his art, the blood of the first purchaser would have indeed no bounds but the veins of all mankind" (b). The question before the court was whether, where the intestate had inherited from her mother, who had inherited from the intestate's grandfather, the half-brethren of the intestate, being children of her father on his first marriage

Mistake in referring to ancestors in the plural.

(a) *Doe d. Delaplaine v. Jones*, 3 Halstead, 340. See also as to half-blood, and that "the blood" of the ancestor includes his relations of the half blood; 2 Pet. 58; 5 Whart. 477; 2 Hals 340; 14 N. Y. Rep. 235. The half-blood.

(b) Considering the statistics as to illegitimacy, it is to be feared that even the Royal College of Heralds, and Garter, Lyon, and Ulster Kings-at-arms, though aided by genealogical tables extending to the first geological period, would be baffled by many a bar sinister, and the stern common law rule, *qui ex damnato coitu nascuntur inter liberos non computentur*. Blackstone states, as such "have no legal ancestors, they can have no collateral kindred," indeed he says, "they have no blood in them," which remark is considerably opposed to the unlimited amount of blood ascribed to a first purchaser by the learned American Judge; a purchasing bastard, as *nullius filius*, being necessarily a first purchaser. The consequence is, so many purchasing bastards there have been, so many persons are there, who, according to the common law, as regards descent and blood relationship, occupy the position of our first parents; they "have no legal ancestors, they can have no collateral kindred." On an easement also at common law, in the case of an attainted felon, "The channel which conveyed the hereditary blood from his ancestor to him, is not only exhausted for the present, but totally dammed, and rendered impervious for the future."—2 Blackstone, 254.

As to blood relationship.

with the intestate's sister, could inherit in preference to uncles of the intestate, brothers of her mother. The Court held that the blood relationship of the half-blood to the intestate's mother could be made out by tracing back to her father, the common ancestor.

In the same case also one learned Judge said : " If it be answered that the half-blood must not look back so far as Adam or Noah, it is all I want, for then *some restriction* is admitted to be implied, and the only dispute will be what that restriction is. I contend for the restriction of proximity as established by the Legislature in the Act concerning descents ; such is a legal restriction, and will make the proviso (excluding the half-blood not of the blood of the ancestor.—ED.) yield us a sensible and a practicable rule."

Under a statute directing that the " estate shall go to the kin next to the intestate, of the blood of the person from whom such estate came or descended" to the intestate, it was held that a father is of the blood of his daughter within the Act, and the maternal grandfather of the intestate would take an estate descended to the intestate from her mother, to the exclusion of brothers and sisters of the mother. (a).

SECTION 37.

If there be failure of heirs the rules under Statute of Distribution govern.

37 On failure of heirs under the preceding rules, the inheritance shall descend to the remaining next of kin of the intestate, according to the rules in the English Statute of Distribution of the personal estate. 14, 15 V. c. 6, s. 15.

The mode of distribution under this Act is given hereafter (b).

SECTION 38.

Co-heirs to take as tenants in common.

38. Whenever there shall be but one person entitled to inherit according to the provisions of the twenty-second and following sections of this Act, he shall take and hold the inheritance solely ; and wherever an inheritance, or a share of an inheritance, shall

(a) *Cole v. Battey*, 2 Curtis C.C. 562 ; see also as to blood relationship, *Gardner v. Collins*, 2 Peters 58 ; *Champlin v. Baldwin*, 1 Paige, ante, p. 177 ; and as to ancestral estates, see remarks under s. 52.

(b) Post p. 204.

descend to several persons under such provisions, they shall take as tenants in common, in proportion to their respective rights. 14, 15 V. c. 6, s. 16.

Section 38 in providing that an estate shall descend to more than one as tenants in common, virtually abolishes descent in co-parcenary. Annuls descent in coparcenary.

SECTIONS 39, 40, 41.

39. Descendants and relatives of the intestate begotten before his death, but born thereafter, shall in all cases inherit in the same manner as if they had been born in the lifetime of the intestate and had survived him. 14, 15 V. c. 6, s. 17. Descendants, &c., born after death of intestate, to inherit.

40 Children and relatives who are illegitimate shall not be entitled to inherit under any of the provisions of this Act. 14, 15 V. c. 6, s. 18. Illegitimate persons not to inherit.

41. The estate of the husband as tenant by the curtesy, or of a widow as tenant in dower, shall not be affected by any of the provisions of the last preceding nineteen sections of this Act, nor shall the same affect any limitation of any estate by deed or will, or any estate which, although held in fee simple or for the life of another, is so held in trust for any other person, but all such estates shall remain, pass and descend, as if the last nineteen sections of this Act numbered from twenty-two to forty both included, had not been passed. 14, 15 V. c. 6, s. 19. Curtsey, dower and estates by deed or will excepted.

Section 41 expressly excepts estates vested in trustees. The whole inconvenience of partible inheritances in making a title, would result without any benefit, if the act had not excepted these estates. The interests of the *cestuis qui trust*, however, under section 50 will descend under the act: the reference in that section to section 40 is a mis-print, it should refer to 41. Estates vested in trustees excepted from the act.

SECTIONS 42, 43, 44, 45.

42. If any child of an intestate shall have been advanced by the intestate by settlement, or portion of real or personal estate, or both of them, and the same shall have been so expressed by the intestate in writing or so acknowledged in writing by the child, the value thereof shall be reckoned, for the purposes of this Case of children who have been advanced by settlement, &c.

section only, as part of the real and personal estate of such intestate descendable to his heirs, and to be distributed to his next of kin according to law; and if such advancement be equal or superior to the amount of the share which such child would be entitled to receive of the real and personal estate of the deceased, as above reckoned, then such child and his descendants shall be excluded from any share in the real and personal estate of the intestate. 14, 15 V. c. 6, s. 20.

If such advancement be not equal.

43. If such advancement be not equal to such share such child and his descendants shall be entitled to receive so much only of the personal estate, and to inherit so much only of the real estate of the intestate, as shall be sufficient to make all the shares of the children in such real and personal estate and advancement to be equal, as near as can be estimated. 14, 15 V. c. 6, s. 21.

Value of property advanced, how estimated.

44. The value of any real or personal estate so advanced shall be deemed to be that, if any, which may have been acknowledged by the child by any instrument in writing, otherwise such value shall be estimated according to the value of the property when given. 14, 15 V. c. 6, s. 22.

Education, &c., not advancement.

45. The maintaining or educating, or the giving of money to a child, without a view to a portion or settlement in life, shall not be deemed an advancement within the meaning of this Act 14, 15 V. c. 6, s. 23.

Precaution requisite on purchase from co-heir.

The provisions of these sections shew the necessity of precaution and enquiry as to advancement on purchase from one claiming as co-heir.

New York act.

These sections are as those of the New York revised Act (a) with this exception, that the latter does not require any writing as evidence of the advancement. The Statute of Distributions has somewhat similar provisions, as will be hereafter explained.

American decisions.

Under the the Statutes of Descent and of Distribution of personalty (b) in New York, the rule required by equity, and that intended by the statutes is, that advancement made by real estate should go first against real estate de-

(a) See ante p. 167 as to this Act.

(b) 2 Rev. Stat. N. Y., p. 97; see ed. by Denio and Tracey at Osgoode Hall vol. 2, p. 283.

scended, and be charged on the shares of heirs, and against those who represent those shares ; while on the other hand advancements made in personal estate, or money, should be accounted for in the distribution of the personalty, and be charged on the next of kin as such, and on the shares which they represent (a).

It would seem that these sections will not apply unless there be a total intestacy. The act speaks of the child of an *intestate*, and in strictness a person cannot be said to die intestate if there be a will, though part of his property be undisposed of. The decisions under the Statute of Distributions (b) and under the New York Act (c) go to shew that short of total intestacy these sections do not apply.

Do these sections apply except in case of total intestacy?

The Act speaks of the *child* of an intestate being advanced, and Mr. Chancellor Kent does not consider it as quite clear that this would extend to a grandchild, or rather as regards the American Acts he says that "it would have been better if the statutes had been more explicit, and not have imposed on the courts the necessity of extending by construction and equity the meaning of the word 'child,' so as to exclude a grandchild who should come unreasonably to claim his distributive share when he had already been sufficiently settled by advancement" (d). It may be gathered however that the impression of the learned Chancellor was that the word "child" would extend to remoter lineal descendants, and he refers to authorities as in favor of that view (e) : if he did not express a positive opinion on the subject, it was probably only by reason of the language of other American Acts on the same

Do they extend to grandchildren?

(a) Supreme Court, *Perry v. Dayton*, 31 Barb. 519 ; *Abbott's Digest* vol. 6, p. 6.

(b) See *Wm's. Exrs.* 6th ed. vol. 2, p. 1387, post p. 200.

(c) 5 Paige, 450. *Thompson v. Carmichael*, 3 Sandf. Ch. 120 ; 4 Kent Com. 11th ed. 463. *Abbott's Digest*, vol. 1, p. 35.

(d) 4 Kent Com., 11 ed. 463.

(e) *Wyth v. Blackman*, 1 Ves. Sr. 196 ; *Royle v. Hamilton*, 4 Ves. 437 ; *Dickinson v. Lee*, 4 Watts 82. But see the construction in wills, *Radcliffe v. Buckley*, 10 Ves. 195 ; *Pride v. Fooks*, 3 De G. & J. 252 ; *Lord Orford v. Churchill*, 3 V. & B. 59 ; and see also Con. St. c. 73, ss. 16 & 17, and the remarks thereunder.

subject, some of which expressly extend to descendants, some to grandchildren, and some to issue.

Difference as to advancement under Stat. of Distributions, New York act, and this act.

On questions of advancement the decisions under the Statute of Distributions hereafter referred to may be of service, as also those of the State of New York (*a*); but in applying them the distinction between this Act and those must be borne in mind. Thus for instance, the Statute of Distributions does not require there should be any expression by the intestate or the child in writing, and only applies to intestate *fathers*, nor is it as express in its provisions as section 45; the Act of New York also does not require writing as evidence of the advancement.

Decisions as to advancement on Stat. of Distributions.

The question of advancement under the Statute of Distributions is treated of in Williams on Executors (*b*) as follows:—

“The fifth section provides that no child of the intestate, except his heir-at-law, who shall have any estate in land by the settlement of the intestate, or who shall be advanced by the intestate in his lifetime by pecuniary portion, equal to the distributive shares of the other children, shall participate with them in the surplus; but if the estate so given to such child by way of advancement be not equivalent to their shares, then that such part of the surplus as will make it so shall be allotted to him or her (*c*). ”

This just and equitable provision has been also said to be derived from the *collatio bonorum* of the Imperial law; which it certainly resembles in some points, though it differs widely in others: but it may not be amiss to observe that with regard to goods and chattels, this is part of the ancient custom of London, of the Province of York, and of the sister Kingdom of Scotland; and with regard to the lands descending in co-parcenary, that it has always been, and still is, the common law of England, under the name of hotch-pot (*d*).

(*a*) Abbott's Digest vol. 1, p. 35; Kent Com. vol. 4, 11th ed., p. 461.

(*b*) Wms. on Exrs. 6th ed. vol. 2, p. 1386.

(*c*) 2 Black. Comm. 516.

(*d*) 2 Black. Comm. 517.

This provision applies only to the distribution of the estates of intestate *fathers*; and therefore, if a mother, being a widow, advances a child, and dies intestate, leaving many children, the child advanced shall not bring what he received from his mother into hotch-pot. This was decided by Lord King, C., on the principle that the statute was grounded on the custom of London, which never effected a widow's personal estate, and that the act seems to include those alone within the clause of hotch-pot, who are capable of having a wife as well as children, which must be husbands only (a).

The statute takes nothing away that has been given to any of the children, however unequal that may have been: how much soever it may exceed the remainder of the personal estate left by the intestate at his death, the child may, if he pleases, keep it all; if he be not contented, but would have more, then he must bring into hotch-pot what he has before received. This manifestly seems to be the intention of the Act, grounded upon the most just rule of equity, equality (b).

The provision in the statute applies only to the case of actual intestacy; and where there is an executor, and consequently a complete will, though the executor may be declared a trustee for the next of kin, they take as if the residue had been actually given to them: therefore, a child advanced by his father in his life, or provided for in the will, cannot be called on to bring his share into hotch-pot (c).

If a child, who has received any advancement from his father, shall die in his father's lifetime, leaving children, such children shall not be admitted to their father's distributive share, unless they bring in his advancement; since, as his representatives, they can have no better claim than he would have had, if living (d).

(a) *Holt v. Frederick*, 2 P. Wms. 357. S. C. 2. Eq. Cas. Abr. 446.

(b) By Lord Raymond. in *Edwards v. Freeman*, 2 P. Wms. 443.

(c) By Sir W. Grant. in *Walton v. Walton*, 14 Ves. 324, 2 P. Wms. 440, 446; see also *Vachell v. Jeffreys*, Prec. Chanc. 169.

(d) *Proud v. Turner*, 2 P. Wms. 560.

A child advanced in part shall bring in his advancement only among the other children; for no benefit shall accrue from it to the widow (a).

It will be convenient to consider this subject further.
1. With respect to children who have any land by settlement of the intestate. 2. With respect to children who have been advanced by pecuniary portions.

The statute extends not only to land freehold and copyhold settled on a younger child by the father, but also to charges upon land for such child (b): so if a father settle a rent out of his lands on a younger child, this is within the statute (c) and so is a reversion settled on any child but the heir (d).

Land claimed by marriage settlement has been held an advancement within the statute; but land devised by the father to a younger child is not to be so considered: for a provision to be brought into hotch-pot must be such as is made by an act in the intestate's lifetime, and not by will (e).

Money laid out by the intestate on repairs of houses, which had been given, but not conveyed, by him to his eldest son, and which had therefore descended on him as heir-at-law, has been held not to be an advancement to be brought into hotch-pot under the statute; though it would have been otherwise if the father in his lifetime had irrevocably parted with the estate by a conveyance to the son and afterwards given him a sum of money to ameliorate it (f).

2. With regard to children who have been advanced by pecuniary portion. By the provisions of the statute, although the heir-at-law shall not abate in respect of the land which came to him by descent, or otherwise from the intestate, yet, if he hath had any advancement from his

(a) *Ward v. Lant*, Prec. Chanc. 182, 184; *Kircudbright v. Kircudbright*, 8 Ves. 51, 64, (b) By Sir Joseph Jekyll, 2 P. Wms. 441.

(c) 2 P. Wms. 441.

(d) 2 P. Wms. 442.

(e) By Sir J. Jekyll, 2 P. Wms. 440; *Twisden v. Twisden*, 9 Ves. 425, 462, by Lord Eldon.

(f) *Smith v. Smith*, 5 Ves. 731.

father out of his personal estate, he shall abate for it in the same manner as the other children (*a*): and were it merely the use of furniture for his life, it shall be regarded as an advancement *pro tanto* (*b*).

Co-heiresses shall also, it seems, bring in such advancement, not being land (*c*), as they may have respectively received from their father, before they shall be entitled to their distributive share, agreeably to the principle of the Act, and to the object of a just and impartial father to promote an equality among his children (*d*).

It remains to consider what is, and what is not, to be regarded as an advancement out of the personal estate of the father, so as to exclude a child from a distributive share of the whole or part of the residue.

A provision made for a child by a settlement, whether voluntary, or for a good consideration, as that of marriage, is such an advancement (*e*).

It is not requisite, to constitute an advancement, that the provision should take place in the father's lifetime (*f*). If by deed he settle an annuity, to commence after his death, on one of his children, it is an advancement (*g*). So a portion secured to the child, although *in futuro*, is an advancement (*h*). Thus a portion for a daughter, to be raised out of land, on her attaining the age of eighteen, or the day of her marriage, was held to be an advancement to her when she married, although she was under that age, and unmarried, at the time of the intestate's death (*i*).

A portion which was at first contingent, shall clearly be considered an advancement, when the contingency has

(*a*) Pratt v. Pratt. Fitzgib, 285 Com. Dig. Admon (H.) 4 Burn, E. L., 397, 8th edit.; Smith v. Smith, 5 Ves. 721.

(*b*) Pratt v. Pratt, Fitzgib. 285, Com. Dig. Admon (H) Kircudbright v. Kircudbright, 8 Ves. 51.

(*c*) See Dillon v. Coppin 4 M. & Cr. 647.

(*d*) 4 Burn, E. L. 397, 8th edit. Toller, 378.

(*e*) Edwards v. Freeman, 2 P. Wms. 440, 441; Phiney v. Phiney, 2 Vern. 638.

(*f*) 2 P. Wms. 445.

(*g*) 2 P. Wms. 442; Swinb. Pt. 3, s. 18 pl. 25. (*h*) 2 P. Wms. 445.

(*i*) Edwards v. Freeman, 2 P. Wms. 435; S. C. 1 Eq. Cas. Abr. 249, pl. 10. 2 Eq. Cas. Abr. 446, pl. 3,

happened (a). And it seems that a portion, even while contingent, being capable of valuation, may be brought into hotch-pot (b): or the Court may order that in case the contingency shall happen, the portion shall be so distributed as to make the rest of the children equal with the child on whom it was settled (c): but the contingency must be so limited as necessarily to arise within a reasonable time; as in the case stated above, where the portion was secured to the daughter, on her attaining the age of eighteen, or on her marriage (d).

Where a father makes a provision for a son on his marriage, all the limitations in such settlement to the wife and children of such son must be considered as part of that advancement; and it is not the son's estate for life only that ought to be valued, and brought into hotch-pot (e).

With respect to the sort of benefit which shall constitute such advancements, it has been held, that if a father buy for a son an advowson, or any other ecclesiastical benefice, or if he buy him any office, civil or military, these are to be considered as advancements, either partial or complete, according to the comparative value of the estate to be distributed (f). And although the office be only at will, as a gentleman pensioner's place (g), or a commission in the army (h), it is to be regarded in the same light.

An annuity is an advancement to be brought into hotch-pot (i), viz., the value at the date of the grant; or, if it has ceased, the payments received, at the option of the child (k).

(a) 2 P. Wms. 442.

(b) 2 P. Wms. 442, 449; Toller 377.

(c) 2 P. Wms. 446; Toller 378.

(d) 2 P. Wms. 440, 445, 449; Toller 378.

(e) *Weyland v. Weyland*, 2 Atk. 635; see *Dillon v. Coppin*, 4 M. & Cr. 647, 669.

(f) *Hender v. Rose*, 3 P. Wms. 317, note to *Pusey v. Desbouverie*.

(g) *Norton v. Norton*, 3 P. Wms. 317, note.

(h) *Kircudbright v. Kircudbright*, 8 Ves. 63.

(i) *Swinb. Pt. 3*, s. 18, pl. 29.

(k) *Kircudbright v. Kircudbright*, 8 Ves. 51.

In a modern case a father lent the sum of £10,000 to his son, to assist him in forming a partnership in the business of a sugar refiner, and took his promissory note for the repayment of that sum on demand: it appeared that it was in consequence of the urgent desire of the intestate that the son engaged in the business; and that finding it was a losing concern he became desirous of retiring from it, but that the father urged him to continue it; that, at the earnest entreaty of the intestate, he, with much reluctance, continued the business, and sustained heavy losses in it. The father on his death-bed caused the promissory note to be burned, and died intestate: Sir John Leach, M. R., held, that, although the circumstances under which the note had been destroyed amounted to an equitable release of the debt, yet that the sum which remained due upon it must be considered an advancement to the son (a).

On the other hand, small inconsiderable sums of money given to a child by the father, or mere trivial presents he may make to a child, as of a gold watch, or wedding clothes, shall not be deemed an advancement (b): nor shall money expended by the father for the maintenance of a child, nor given to bind him an apprentice, nor laid out in his education at school, at the university, or on his travels (c).

It is presumud, indeed, that a distinction must be made when a considerable sum of money is advanced by the father with the child as a premium for instruction, and not merely as a compensation for maintenance, and that the former sum is in strictness liable to be brought into hotch-pot (d). In allusion to this distinction, it is conceived that Lord Hardwicke expressed himself in *Morris v. Burroughs* (e): "I should think," said his Lordship, "that if a father

(a) *Gilbert v. Wetherell*, 2 Sim. & Stu. 254. As to what constitutes an advance in money, within the meaning of that expression, see *Auster v. Powell*, 31 Beav. 583, 1 De G. J. & S. 99.

(b) 3 P. Wms. 317, note to *Pusey v. Desbouverie*; *Elliott v. Collier*, 1 Ves. Sen. 16. S. C. 3 Atk. 528: nor, says Swinburne, money in his purse to spend among his equals, or buy him suits of apparel, or books, or armour for the service of his country: *Swinb. Pt. 3*, s. 18, pl. 30.

(c) *Swinb. Pt. 3*, s. 18, pl. 19. *Bac. Abr. tit. Exors* (K).

(d) 2 *Rop. Husb. & Wife*, 12.

(e) 1 Atk. 403.

should give money to put a son out apprentice, or advance him in life by setting him up in trade, &c., that would have the same effect," *i. e.*, will be a satisfaction of the custom, or must be brought into hotch-pot, as the case may happen to be.

It has already been stated, that a provision which a father may make for his child by will, in a case where the testator dies intestate as to part of his personal estate, shall not be brought in hotch-pot (a). Such a provision as shall be construed an advancement must result from a complete act of the intestate in his lifetime (b), by which he divested himself of all property in the subject: though, as it has just appeared, it is not requisite that it should take effect in possession till after his death (c). Still less shall property given or bequeathed to the child by any other person be so denominated (d); and least of all shall a fortune of his own acquisition, however great" (e).

SECTIONS 46, 47, 48, 49.

As to the purchase by any of the parties interested of real estate, subject to partition.

46. The parties authorized to make partition of any such real estate according to law, shall receive from any of the persons entitled to a share of such real estate, an offer or proposition to purchase the share or shares of the other parties interested therein, giving the preference to the person who would have been the heir-at-law thereto, had the twenty-second and following sections of this Act not been passed; and next after such heir-at-law, giving such preference to the several persons successively who would have been such heir-at-law, had the said last mentioned sections of this Act not been passed, and had those persons preceding them respectively in the series of such preference been dead at the time of the death of the intestate.

Particulars of offer to purchase to be certified by the court.

47. The parties so authorized to make such partition, shall certify particularly to the Court in which proceedings for a partition may be commenced or pending, the particulars of such offer or proposition for purchase, the nature, quantity and value

(a) Wms. Exrs. p. 1387, 14 Ves. 324.

(b) 2 P. Wms. 440; Toller, 380.

(c) Wms. Exrs. p. 1389; Toller, 380.

(d) Swinb. Pt. 3, s. 18, pl. 18. Bac. Abr. tit. Exrs. (K). Toller, 380.

(e) Swinb. Pt. 3, sec. 18, pl. 18. Bac. Abr. tit. Exors. (K).

of the estate or share proposed to be purchased, and whether they advise such offer or proposition to be accepted or rejected, and their reasons therefor.

48. Any Court authorized to make partition of real estate, may direct a sale of the same if they think it right so to do, upon the application of any of the parties beneficially interested therein, giving however the preference at all times to the person who would have been the heir-at-law to such real estate had the twenty-second and following sections of this Act not been passed, and after such heir-at-law, then giving such preference to the several persons successively who would have been such heir-at-law, had the said last mentioned sections of this Act not been passed, and had those persons preceding them respectively in the series of such preference been dead at the time of the death of the intestate.

Any court authorized to make partition may direct a sale, giving preference, &c.

49. Every such preference shall be upon and subject to such terms, security and conditions as the Court may think it right to direct. 14, 15 V. c. 6, s. 24.

Terms on which preference to be given.

The right of preëmption given by these sections to those who successively would have taken as heirs under the former law, inseparably links this statute with that of William, and with the common law. A knowledge of the old law will continue necessary for this cause alone, independently of the fact that the estate of trustees will descend as before this Act (sec. 41), and that estates tail are not within its operation (sec. 23).

These sections involve knowledge of the law under the Act of Wm.

The Act of New York has no such provisions as in these sections, but similar provisions exist, or existed, in some States of the Union, as Vermont, Pennsylvania, Connecticut and Maryland (a).

SECTION 50.

50. In the last twenty-seven sections of this Act numbered from twenty-three to forty-nine both inclusive, the term "real estate" shall be construed to include every estate, interest and right, legal and equitable, held in fee simple or for the life of another (except as in the fortieth section is before excepted) in

Interpretation as to sections 23 to 49.

(a) See Kent's Com. vol. 4, 11th ed. p. 423, n. a.

lands, tenements and hereditaments in Upper Canada, but not to such as shall be determined or extinguished by the death of the intestate seized or possessed thereof, or so otherwise entitled thereto, nor to leases for years; and the term "inheritance," as therein used, shall be understood to mean real estate as herein defined, descended or succeeded to, according to the provisions of the said twenty-seven sections. 14, 15 V. c. 6, s. 25.

Reference to
s. 40 a mis-
print.

The reference to section 40 in this section is a misprint; it should be section 41.

The legal estate vested in a trustee will not descend according to this act, being excepted by section 41.

SECTION 51.

Interpretation
as to sections
23 to 50.

51. Whenever, in the last twenty-eight preceding sections, numbered from twenty-three to fifty both included, any person is described as living, it shall be understood that he was living at the time of the death of the intestate from whom the descent or succession came, and whenever any person is described as having died, it shall be understood that he died before such intestate. 14, 15 V. c. 6, s. 26.

Section 52.

Section 52 was before treated of (a), and the meaning and effect of the expressions therein, and of the words *inheritance* and *of the blood*, were also considered in treating of sections 27, 36 (b).

Summary of
descent under
Stat. of Vic-
toria.

It may now be well to give a *summary* of what has been explained as to the present law of descent. Assume the intestate to be the *purchaser*, or that the estate came on neither the paternal or maternal side; the estate will descend, first, to the lineal descendants of the intestate, and those claiming under them *per stirpes* or *per capita* according to whether the claimants are in equal or unequal degrees of consanguinity, as before explained; and subject to the law of hotch-pot, dower, and curtesy. Failing descendants, it will go to the father. If there be no father, but a mother, and brothers or sisters, or descendants of brothers or sisters; it goes to the mother for life, and the remainder

(a) Ante p. 174.

(b) Ante pp. 177, 187.

to the brothers and sisters (including the half-blood) and descendants of such as may be dead, *per stirpes* or *per capita* according to the degree. If there be no father, or brother, or sister, or descendant of such, it goes to the mother. If no father or mother; it will go to brothers and sisters, and descendants of such, *per stirpes* or *per capita* (including the half-blood). Failing descendants, father, mother, brothers and sisters, and descendants of brothers or sisters; then uncles and aunts on both paternal and maternal sides take, and their descendants *per stirpes* or *per capita* as the case may be. Failing the last resort, viz., uncles and aunts, and their descendants, the Statute of Distributions governs.

If the estate came not as above supposed, but by descent, devise, or gift, from the father, or some relative of the blood of the father, (sections 32, 52,) it will still go as above, but the maternal uncles and aunts will be *postponed* to the maternal uncles and aunts, and their descendants: should the estate have come, however, from some paternal *ancestor* of the intestate, it would seem that in such case and in such case only, the *half-blood* on the *maternal* side would be entirely *excluded*, (s. 36).

If the estate come to the intestate *on the part of the mother*, i.e., by descent, devise, or gift, from her, or from some relative of her blood (s. 52), there is more variance: thus, in such case, failing lineal descendants, if father, mother, brothers and sisters (including half-blood), or descendants of brothers or sisters be living, the mother will take for life, and the remainder go to the brothers and sisters, (including those of half blood), and their descendants; but if the mother were dead, the father would take in her place for life, the remainder going over as before; and it would be only in the event of there being no mother, brothers, or sisters, or descendants, that the father would take absolutely. If there were a mother and father, and no brothers or sisters, or descendants, the mother would take in preference to the father. Failing father, mother, brothers, sisters, and descendants of brothers and sisters; the maternal uncles and aunts and their

descendants will take in preference to those on the paternal side, who only take on all others entitled as above, being exhausted; and failing these the Statute of Distributions again governs. The above presupposes that the estate came from some relative of the blood of the mother, and not from the mother or other *maternal ancestor*; for in the latter case apparently the half-blood on the paternal side would be excluded, (s. 36).

In any event the right of dower and tenancy by the curtesy attaches, according as permissible before the statute, which gives the descent subject to those claims.

Right of succession to personalty under Stat. of Distributions.

The right of succession to personal estate under the Statute of Distributions is governed by 22 & 23 Car. 2 ch. 10, explained by 29 Car. 2 ch. 30, by which it is enacted that the surplusage of intestates' estates, (except of *femes covert*, which were left as at common law) (a), shall, after the expiry of one full year from the death of the intestate, be distributed in the following manner: one-third to the widow of the intestate, and the residue in equal proportions to his children, or if dead, to their representatives, that is, their lineal descendants, *per stirpes* or *per capita*, according as the parties are in equal or unequal degrees of consanguinity to the intestate, in like manner as they would inherit real estates, as before pointed out in treating of ss. 24, 25. If there are no children or legal representatives subsisting, then a moiety to the widow, and a moiety to the next of kindred in equal degree and their representatives. If no widow the whole shall go to the children. If neither widow nor children, the whole shall be distributed among the next of kin in equal degree and their representatives; but no representatives are admitted among collaterals, farther than the children of the intestate's brothers and sisters. Brothers and sisters, and children of deceased brothers and sisters will

(a) See Con. Stat. 73. s. 17, the separate estate of an intestate married woman goes to her husband and children as the personalty of an intestate husband would go to his widow and children, and if there be no children, then as if the Act had not been passed, and thus the husband would be entitled to the whole as entitled to administration.

take *per stirpes* or *per capita* according to the degrees, as they would inherit real estate as before mentioned under section 30. The right to take by representation among collaterals being confined to children of brothers and sisters, a son of a deceased uncle will not be entitled to share with an uncle living, nor a child of a deceased nephew with a living nephew, nor a grandchild of a deceased brother of the intestate with a child of a deceased brother of the intestate. The next of kin are to be investigated by the same rules of consanguinity as prevailed, as before explained (a), according to the computation of the civilians, and not of the canonists, which the law of England adopts in the descent of real estates; because in the civil computation, the intestate himself is the *terminus*, *a quo* the several degrees are numbered, and not the common ancestor, according to the rule of the canonists: and therefore, the mother, as well as the father, succeeded to all the personal effects of their children, who died intestate and without wife or issue, in exclusion of the brothers and sisters of the deceased. And so the law still remains with respect to the father; but by Statute 1 Jac. 2 c. 17, if the father be dead, and any of the children die intestate without wife or issue, in the lifetime of the mother, she and each of the remaining children or their representatives, divide his effects in equal portions to each. When the father takes, he takes all to the exclusion of the mother. If there be no parents or children, or descendants of children, and the nearest surviving relations are brothers and sisters, and grandfather and grandmother, the two former will take, though all are in the second, and therefore equal degree. Grandfather or grandmother will exclude uncles and aunts, the latter being in the third degree: which is the reverse of the present law as to realty. Great grandfathers and great grandmothers share with uncles and aunts, all being in equal degree. A grandfather on the father's side and

(a) pp. 117, 134.

grandmother on the mother's side share equally, dignity of blood not being material. Aunts and nieces, uncles and nephews, being all in the third degree, are equally entitled. Relationship by marriage gives no title, except in case of the wife of the intestate. Relations by the half-blood take equally with those of the whole blood in the same degree.

Con. Stat. 73.
as to separate
property of
married
women.

The above is subject to an exception as regards the separate personal property of a married woman, under Con. Stat. ch. 73, by s. 17 of which, such property, on death of the married woman intestate, leaving a husband and children, will go as to one-third to the husband, and the residue to the children; and if there be no children, then it will go as if the Act had not been passed, and so the husband could acquire the whole as entitled to administration.

Comparison of
descent of
realty and of
succession to
personalty,

It will have been seen, as pointed out, in considering the various sections of the Statute of Victoria, that the whole course of descent does not differ widely from the rules of succession to personalty under the Statute of Distributions; that the former as well as the latter are based on the civil law, and the claimants take much in the same order and computation of degrees; and where claimants do not take under the Statute of Distributions equally with those in the same degree, the same exceptions exist under the law as to realty. Thus, father, mother, and children of an intestate are in the same degree of consanguinity to him, viz., the first degree; but an exception to the rule that all in equal degrees share equally, exists both as to personalty and realty in favor of the children, who take priority, without any distinction as to the half-blood, (unless in case of real estate come from a lineal ancestor, section 36); and in each case they and their descendants take *per stirpes* or *per capita*, according to whether they are all in equal or unequal degrees; a system quite unknown to the common law. Again, failing the father and descendants; the mother being the only remaining person in the first degree, would

have taken all, but by the Statute of James (there being no widow), she is to take an equal share *absolutely* with brothers and sisters of the intestate, and their children : and the Statute of Victoria proceeds on the same principle, and gives the realty to the mother *for life*, and the remainder to brothers and sisters, and their descendants. As to those in the second degree, viz., grandfathers, grandmothers, brothers and sisters, the same rule and the same exception to it exists as above alluded to ; they are all in equal degrees, and yet the brothers and sisters take priority. So again, neither as to personalty or realty will one or more surviving brothers or sisters, as nearest in degree, exclude the children of a deceased brother or sister, as more remote in consanguinity—no distinction is made by reason of age, sex, or blood, (unless, indeed, as to the latter in case of an ancestral estate) : and the peculiar mode of taking, sometimes *per stirpes* and sometimes *per capita*, pervades both systems, and applies in like cases : there is also the same law of hotch-pot with but trifling variation. The rights as to realty of the widow or husband of an intestate cause no great variance, at least in principle : they take interests in the realty under the same circumstances that they would in personalty, though the value of the interest may differ. Thus, the widow by express reservation of her right in the Statute of Victoria, takes her dower or one-third *for life* in realty ; and in personalty she takes the same proportion *absolutely* if there are lineal descendants, and if none then one-half absolutely : so the husband may take under similar reservation as tenant by the curtesy (issue being born who might inherit), the whole of the realty for life ; whilst, as to personalty, the separate property of the wife, he will under Con. Stat. ch. 73 receive one-third *absolutely* and the residue will go to the children in the same manner as personalty of a husband would be distributed between widow and children, and if no children he will take all absolutely.

The variance seems chiefly to consist in this : that the **Variance**, Statute of Victoria, when the inheritance is derived by the

Variance,

intestate from a relative, gives preference in certain instances to the blood of such relative, as may be exemplified by its *excluding* the half-blood, (if the estate have been derived from an *ancestor*), and *postponing* the uncles and aunts, (if derived from a *relative*), on the side on which the inheritance is not derived; and in giving also the father only a life-estate, if the property came on the maternal side, where he would otherwise take the fee: whilst as to personalty no regard is paid as to the derivation of the property. Again, grandfathers and grandmothers are excluded as to realty, unless they can take under s. 27; whilst as to personalty, they are only postponed to those in the same degree, viz., brothers and sisters, and share in the same class with those of the third degree, viz., uncles and aunts: furthermore, as to realty, the right of representation is extended to *descendants* of collaterals, as of brothers and sisters, uncles and aunts; whilst as to personalty, it extends only to *children* of one class of collaterals, viz., of the brothers and sisters of the intestate.

sometimes a life estate in the whole given as to realty, when in similar circumstances as to personalty, a share is given absolutely.

It will be seen that sometimes the Statute of Victoria gives a life estate in the *whole* and remainder over; whilst the Statutes of Distributions in like circumstances give only a proportion or *share* of the whole, but *absolutely*: the principle still is the same; the same parties take, and are perhaps equally benefited, though in a different mode, for the absolute right to a proportion may be worth neither more nor less than a life estate in the whole. The Statute of Distribution, dealing only with personalty, could give no life-estates, such a dealing with personalty would be foreign to its nature, and the laws which govern it (a), whereas no such difficulties present themselves in giving a life-estate in realty; and such a course has the advantage over giving a share absolutely, that the estate is ultimately preserved more entire. The 28th section affords an illustration of this; it gives the mother an estate for life in all, whilst the Statute of James gives her, in like circum-

(a) See Wms. Pers. Prop. as to the rights and remedies in equity of one entitled in remainder after a life interest given in chattels.

stances, (and there being no widow), a moiety absolutely in personalty, the other moiety going to brothers and sisters of the intestate.

The Descent of Estates Tail is unaffected by the Statutes Estates tail. of William and Victoria, and is of a peculiar character, for as it is regulated *per formam doni* and the statute *de donis conditionalibus*, and as descent has to be traced to the first purchaser, or donee in tail, the common law maxim *seisina facit stipitem* does not apply (a), nor consequently is there any exclusion of the half-blood, for the issue in tail are always of the whole blood of the donee (b). Other common law rules still govern, and therefore primogeniture, and the preference of males to females still prevails in the case of an estate tail general, as to a man and the heirs of the body. When however the limitation is to a man and the heirs male, or heirs female of his body, the descent can only be traced to and through heirs male in the first case, and heirs female in the other; so that on a gift in tail male, if the donee die leaving two sons, and the eldest enter and die leaving a daughter, the second son, or the heirs male of his body, will next take.

It will have been observed how the principles of the feudal system governed the common law rules of descent. Comparison of the three various periods of descent. It was from the person last actually seised, and so ready and present at the call of his lord to render the feudal services, and not from the person last entitled merely, that descent was to be traced. Again, the lineal ancestor never took; a rule founded probably on the feudal principles that the ancestor would be unfit for the military service, on the condition of which the estate was granted: it was only by a fiction of law that collateral ancestors were allowed to take. So also the strict feudal rule, which required the collateral heir to be of whole blood of the purchaser, excluded entirely the collateral kinsman of the half-blood as heir to the person last seised. Again, attainder so

(a) 3 Rep. 41b.

(b) 8 T. R. 213.

far corrupted the blood, that descent could not be traced from or through the person attainted: nor was this, perhaps, unnecessarily harsh, in the troubled times of the middle ages, when fealty and allegiance were all-important. In course of time however, the necessity of many of the rules founded on the feudal system had ceased to exist; and such rules were not only unnecessarily harsh and unjust, but unsuited to modern times; hence the change effected by the Statute of William. The implied condition, *dum bene se gesserit*, on grant to the vassal, had no longer the importance it had in feudal times; and so the corruption of blood consequent on attainder was abolished. The importance which the common law attached to actual possession had passed away, and hence the more just rule was introduced, of not excluding, as the stock of descent, the person last entitled, merely because he did not acquire actual seisin; and the mere fact of his being the person last entitled, was sufficient to enable descent to be traced from him as a *stirpes*, unless indeed he inherited. Military service had ceased to exist as the condition of tenure of an estate, and with it consequently was abolished the rule excluding the lineal ancestor. So again, on principles of natural justice and equity, the half-blood were not excluded, and the land not escheated rather than the half-blood should take, as not being of the blood of the purchaser, but such half-blood were favorably admitted to the inheritance.

While changes however were effected by the Statute of William, it will be seen that they were by no means so radical as those effected by the Statute of Victoria: in fact most of the common law rules still continued. Thus, the law of primogeniture continued among males; the preference also of males to females; the law of coparcenary; the representation by lineal descendants *ad infinitum* of their ancestor, or descent *per stirpes*; and the preference, to a certain extent, given to the blood of the first purchaser, since, if the person last entitled inherited, though from his mother (the purchaser), the heir would be sought for on

failure of lineal descendants among the *maternal* in preference to the paternal line of the person so last entitled.

During the third period, governed by the Statute of Victoria, from the 1st January, 1852, an entirely different system will be found to prevail; a system based on the civil, instead of the feudal law. Every trace of the latter ceases to exist (except a partial relic of the preference given to the blood of the purchaser in cases of the half-blood, and uncles and aunts), and lands, as regards their descent, are placed on somewhat the same footing as chattels; primogeniture is abolished; females take equally with males in the same degree; descent *per capita* prevails in the place of descent *per stirpes*; the half-blood are admitted equally with the whole blood in the same degree (unless in case of an ancestral estate, and the half-blood not being of the blood of the ancestor); and, as though the more fully to sweep away the former law, the Statute of Distributions are to govern in cases not specifically provided for. The existence of each particular system during the three epochs into which the subject has been divided, may be referred to the requirements of the country and of the age in which such system existed or exists, though perhaps in that respect both the Statutes of William and Victoria might have been passed at earlier periods.

CON. STAT. CH. 84.

An Act respecting Dower.

WIDOWS TO BE ENTITLED TO DOWER IN CERTAIN CASES.

Dower out of equitable estates.

1. When a husband dies beneficially entitled to any land for an interest which does not entitle his widow to dower out of the same at law, and such interest whether wholly equitable or partly legal and partly equitable, is an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same land. 4 W. 4, c. 1, ss. 13, 14, 15.

Dower where husband had a right of entry.

2. When a husband hath been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband did not recover possession thereof; but such dower shall be sued for or obtained within the period during which such right of entry or action might be enforced. 4 W. 4, c. 1, s. 14.

DOWER ABOLISHED IN CERTAIN CASES.

Certain dower abolished.

3. No widow shall be entitled to dower *ad ostium ecclesie*, or dower *ex assensu patris*. 4 W. 4, c. 1, s. 15.

HOW DOWER MAY BE BARRED.

Dower may be barred by joint deed of husband and wife.

4. A married woman may bar her dower in any lands or hereditaments in Upper Canada, by joining with her husband in a deed or conveyance thereof in which a release of dower is contained. 2 V. c. 6, s. 3.

When may be barred by separate deed of wife.

5. A married woman may also bar her dower in any lands or hereditaments by executing either or alone, or jointly with other persons, a deed or conveyance to which her husband is not a party, containing a release of such dower. 37 Geo. 3, c. 7, s. 1.

When wife to be examined as to her consent.

6. A married woman barring her dower by a deed or conveyance to which her husband is not a party, shall be examined by one of the Judges of the Courts of Queen's Bench or Common Pleas in Upper Canada, or the Judge of the County Court, or

Chairman or presiding Magistrate of the Court of Quarter Sessions, or two Justices of the Peace for the County in which she resides, or happens to be, touching her consent to be barred of her dower. 37 Geo. 3, c. 7, s. 1; 3 W. 4, c. 9, s. 1; 2 V. c. 6, —50 Geo. 3, c. 10, s. 1.

7. If such married woman upon being so examined gives such consent, and the same appears to the Judge, Chairman or presiding Magistrate, or Justices examining her to be voluntary and not the effect of coercion on the part of her husband or of any other person, such Judge, Chairman, or presiding Justice or Justices shall certify on the back of the deed to the following effect: 37 Geo. 3, c. 7, s. 2.

We, A. B. and C. D., of the County of _____, in the Form. Province of Canada, Esquires, two of her Majesty's Justices of the Peace, in and for the said County, or, I (a Judge, &c., as the case may be), do certify that E. F., wife of G. F., personally appeared before us (or me, as the case may be), and being duly examined by us (or me), touching her consent to be barred of her right of dower of and in the lands in the within deed mentioned; it did appear to us (or me) that the said E. F. did give her consent thereto freely and voluntarily without coercion or fear of coercion on the part of her husband or of any other person.

Signed,

Dated at _____

3 W. 4, c. 9, s. 1.

8. A married woman being within the United Kingdom of Great Britain and Ireland, or any of Her Majesty's Colonies, or the United States of America, and there barring her dower by any deed or conveyance to which her husband is not a party, shall be examined as mentioned in the sixth section of this Act, by the Mayor or Chief Magistrate of a City or Town if in the United Kingdom, or if in a Colony or in one of the United States, by a Judge of the Supreme Court of the Colony or State, and if she gives such consent and the same appears to the person so examining to be free and voluntary and not the effect of any coercion as aforesaid, such person shall certify on the back of the deed to the effect prescribed by the seventh section of this Act. 48 Geo. 3, c. 7, s. 1.

Who to certify
out of Upper
Canada.

9. Any certificate under the last section of this Act, shall, if granted by a Mayor or Chief Magistrate, be under the common seal of the City or Town over which such Mayor or Chief Magis-

Certificate,
how verified.

trate presides, or under the seal of office of such Mayor or Chief Magistrate, and if granted by a Judge, such certificate shall be verified by the seal of the person administering the government of the Colony or State of which the person certifying is a Judge 48 G. 3, c. 7, ss. 2, 3.

Unless the husband is a party, dower not barred without acknowledgment.

Fee for certificate.

10. No deed or conveyance of a married woman to which her husband is not a party, shall be effectual to bar her dower unless the directions contained in the sixth, seventh, eighth and ninth sections of this Act, (*as the case may be*), are complied with. 37 Geo. 3, c. 7, s. 1.

11. A fee of one dollar may be demanded for any certificate under this Act. 50 Geo. 3, c. 10, s. 2—3 W. 4, c. 9, s. 2.

It will be necessary for the consideration of the above, and of other sections and statutes relating to dower, to take a short comprehensive view of the subject. It may be considered under the following heads :—1. Who may be endowed. 2. Of what the widow may be endowed at Law. 3. Of what in Equity. 4. How dower may be barred and defeated, and the right thereto conveyed. 5. The mode of endowment, and damages for detention.

1. WHO MAY BE ENDOWED.

Who may be endowed.

Marriage, evidence thereof, and validity.

She must be the actual wife (*a*): the rule as to proof whereof varies here from the practice in England; as here evidence of co-habitation, and reputation of marriage will suffice, subject to the presumption arising therefrom being rebutted. (*b*).

As to the validity of the marriage.

“The rule that a marriage which is good in the country where it is celebrated is good everywhere (*c*), is subject to

(*a*) As to marriage, the Acts relating thereto, evidence, &c., see Draper on Dower, ch. 2; the Acts there referred to and commented on are: 33 Geo. 3, c. 5; 38 Geo. 3, c. 4; 59 Geo. 3, c. 15; 11 Geo. 4, c. 36; 20 Vic. c. 66; Con. Stat. c. 72; Imp. Stat. 5 & 6 Vic. c. 26, and the Statutes of Henry. See also *Hodgins v. McNeil*, 9 Grant 305; *The Queen v. Roblin*, 21 Q. B. U. C. 352; *Regina v. Chadwick*, 11 Q. B. 238.

(*b*) *Graham et ux. v. Law*, 6 C. P. U. C. 310; *Beatty v. Beatty*, 17 C. P. U. C. 484.

(*c*) See as to marriage by a Christian British subject with a Cree squaw, in 1803, in the Hudson Bay Territory, and cohabitation as man and wife, *Conolly v. Woolrich*, Lower Can. Jurist, Vol. 11, p. 197. See also, as to marriages entitled to the privileges of necessity, *Roding v.*

the qualification that the marriage must not be one prohibited by the country to which the parties belong; and therefore a marriage in the United States between parties domiciled in Canada, who cannot contract marriage here, would be held void and illegal in our Courts" (a). The distinction must be borne in mind between void and voidable marriages; in the latter case, "after the death of either of the parties, the temporal courts, which have no jurisdiction themselves, and must regard every marriage *de facto*, as good, until it is declared void by the ecclesiastical courts, will not permit them to declare the marriage void after the death of one of the parties, when their sentence can have no effect on the marriage itself, it being already dissolved by death, and its only effect will be to bastardize the issue. The result is, that after the death of the parties, the marriage is valid and the issue legitimate *de facto* but not *de jure*" (b). Thus a marriage with a deceased wife's sister cannot be questioned after the death of either party to it, and the widow is entitled to dower (c).

The Imperial Act 5 & 6 Wm. 4, ch. 54, does not apply here to make such a marriage void, and there is no *tribunal* competent to dissolve it. "It cannot be said that any ecclesiastical tribunal or jurisdiction is required in any colony or settlement where there is no established Church, and in case of a *settled* colony, the ecclesiastical law of England cannot, for the same reason, be treated as part of the law which the settlers *carried with them from the mother country*" (d). The Legislature can grant a divorce, but they have established no Court having such power. The English canon law, it has been said, (e) "so far as it was part of the law of England, had been introduced by the

Smith, 2 Hagg. Con. Rep. 371, and as to polygamous marriages, Law Rep. Ct. Pro. and Div. Vol. 1, p. 130, *Hyde v. Woodmansee*.

(a) *Draper on Dower*, p. 13; *Brook v. Brook*, 7 Jur. N. S. 422; *Hodgins v. McNeil*, 9 Grant, 305, per Esten, V. C.

(b) *Hodgins v. McNeil*, *supra*, per Esten, V. C.

(c) *Hodgins v. McNeil*, *supra*.

(d) *Re the Bishop of Natal*, 11 Jur. N. S. 358, per Ld. Chan.

(e) Per Esten, V. C., in *Hodgins v. McNeil*, *supra*.

Constitutional Act," (32 Geo. 3, ch. 1), and that the Provincial Act, 33 Geo. 3, ch. 4, "presupposes the ecclesiastical law in force." In *Regina v. Roblin* it was considered that the Constitutional Act introduced the English Common and Statute Law relating to marriage, including the 26 Geo. 2, ch. 33, unless perhaps section 11, and with the exception of such laws as were not applicable to the condition of the colony (a).

On a divorce *a vinculo* making the marriage void *ab initio*, there will be no dower, but on a divorce *a mensâ et thoro*, dower will be allowed (b).

Forfeiture by adultery and elopement.

By the Statute of West. 2, if the wife commits adultery and elopes she forfeits her dower, unless the husband condoned the offence. The leaving and separation must be the voluntary act of the wife; for where the husband abandoned the wife, and she afterwards lived in adultery, this was held to be no bar to her dower (c). On the other hand, if the wife leave by reason of her husband's cruelty, and live in adultery, she forfeits her dower, for the excuse only applies to the leaving (d).

As to the right of alien widows and widows of aliens.

At common law the widow of an alien, and an alien widow were not entitled to dower (e); but by special Act, 8 H. 5, (not printed), alien women married thereafter to Englishmen with the King's license, are endowable (f). And it would seem that under certain circumstances a *quasi* estoppel would arise which would prevent the plea of alienage of the husband from being a defence. Thus, where the widow of an alien who had conveyed to the tenant, sued for dower, and the defence was the alienage of the husband, Draper, C. J., in giving judgment for the demandant said, (g) "the only title the tenant has, was derived

(a) See also per Esten, V. C., in *Hodgins v. McNeil*.

(b) Co. Litt., 32a.

(c) *Graham v. Law*, 6 C. P. U. C. 310.

(d) *Woodward v. Dowse*, 10 C. B. N. S. 722.

(e) As to alienage, and the statutes and cases relating thereto, see Leith's *Blackstone*, 181, 190.

(f) Co. Litt. 31b, and note 187, ib.

(g) *Davenport v. Davenport*, 7 C. P. U. C. 401; see also *Irwin v. McBride*, 23 Q. B. U. C. 570, per Draper, C. J.

from the demandant's husband; on the principle of the two cases referred to, and especially the latter, there is no doubt in my mind the defence fails." In the case referred to (a) the grantee of an alien was allowed to recover in ejectment against the grantor of the alien who had remained in possession.

The Con. Stat. of Canada ch. 8, sec. 9 is as follows:—

Every Alien shall have the same capacity to take, hold, possess, Con St. c. 8, s. 9, enabling
enjoy, claim, recover, convey, devise, impart and transmit real estate in all parts of this Province, as natural-born or naturalized subjects of Her Majesty, in the same parts thereof respectively. aliens to take and transmit.

Provided always, that nothing herein contained shall alter, Proviso.
impair or affect, or be construed to alter, impair or affect, in any manner or way whatsoever, any right or title legally vested in or acquired by any person or persons whomsoever before the twenty-third day of November, 1849. 12 V. c. 197, s. 12.

By 29 Vic. ch. 16, aliens can take and transmit by descent, 29 Vic. c. 16,
and the Act is to be read retrospectively as part of the Act of 12 Vic., and has a similar proviso as to vested rights. enabling aliens to take and transmit by descent.

2. OF WHAT THE WIDOW MAY BE ENDOWED AT LAW.

To entitle a widow to dower at law (as distinct from her right in equity, which is presently explained), the rule is that she is entitled to be endowed of all lands and tenements of which her husband was seised in fee simple or fee tail at any time during the coverture, and of which any issue which she might have had might by possibility have been heirs; the seisin must have been a several seisin, and of an estate of inheritance in possession (b); though seisin in law would suffice, as also by Stat. 4. Wm. 4, c. 1, a right of entry or action to such estate. Requisites.

It will be observed that there is no necessity that issue should actually be born, as is requisite in tenancy by the curtesy, but the possibility suffices.

There must, to entitle the widow to dower at law have seisin.

(a) Doe d. McDonald v. Cleveland, 6 Q. B. U. C. O. S. 117, Macaulay, J., diss.

(b) Wms. Rl. Prop. 8th ed., 224; Watkins Conv. 9th ed., 89.

Seisin.

Con. Stat. c.
84, s. 2.

been *seisin* in the husband during coverture, and that of an estate of inheritance in possession; this branch of the rule is, however, subject to an exception, created by 4 Wm. 4, ch. 1, Con. Stat. ch. 84, sec. 2 (a), by force of which, if the husband were disseised before coverture and so continued during coverture till death, the widow would yet be entitled to dower, but it must be sued for and obtained within the same period, that the husband's right of entry might be enforced. But if the husband were once seised during coverture, his subsequent disseisin and bar by the Statute of Limitations would not operate against his widow (b).

Dower out of
a remainder.Old form of
conveyance to
uses to bar
dower.

It is the necessity for seisin in the husband which excludes the widow *at law* from dower in trust estates of the husband, of which the legal seisin is in the trustee. So also, dower does not attach on a remainder in fee dependant on a life-estate, if the remainder-man die or alien pending the life-estate (c); for the seisin of the freehold is in the tenant for life, and the remainder also is not an estate of inheritance *in possession*: but if a remainder or reversion be dependant only on a term of years, as the possession of the tenant is the possession and constitutes the seisin of the remainder-man or reversioner, dower will attach; and this is so also with regard to tenant by the curtesy. It was by force of that part of the rule now under consideration that the widow was excluded from dower under one form of conveyance to uses to bar dower, in vogue before the statute last referred to: which form shortly stated was this; to the purchaser for life, with remainder on determination of that estate by surrender or otherwise, to a trustee and his heirs during the purchaser's life, with remainder to the heirs and assigns of the purchaser in fee (d). It will be seen under this form of conveyance that, though *quoad* the life estate the purchaser is seised *in possession*, yet that estate is not of *inheritance*, and

(a) Ante p. 212.

(b) McDonald v. McMillan, 23 Q. B. U. C. 302.

(c) Camming v. Alguire, 12 Q. B. U. C. 330; Pulker et. al. v. Evans, 13 Q. B. U. C. 546.

(d) More fully explained post p. 232.

though (by force of the rule in Shelley's case) he is entitled to the remainder, which is an estate of inheritance, still it is not an estate of inheritance *in possession*.

If the estate be subject to a term of years granted before coverture by way of mortgage, the widow of the mortgagor will be entitled to dower at law, with a *cesset executio* during the term (a), and in equity be entitled to redeem if she thinks fit (b). If the lease be absolute, the widow will be entitled to a third of the rent immediately, and also dower of the land with a *cesset executio* during the term (c). Lease outstanding.

A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowerable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands; which is one reason why he shall not be tenant by the curtesy but of such lands whereof the wife, or he himself in her right, was actually seised in deed. Seisin in law suffices.

The seisin of the husband for a transitory instant only, when the same act which gives him the estate conveys it out of him again, will not entitle the wife to dower; for the land was merely *in transitu*, and never rested in the husband. Thus, the widow of a grantee in fee to uses, in whom the use is immediately executed into possession by the Statute of Uses, in the *cestui qui use*, is not entitled to dower; as if A grants to B and his heirs to the use of C and his heirs, here the widow of B shall not have dower, for the seisin of B was but transitory, the same conveyance which gave him the estate also immediately took it from him by declaring a use on which the Statute of Uses would operate (d). But if the land abides in the husband for the interval of but a single moment, the wife shall be endowed thereof (e): as where a vendor exe- but not a transitory seisin,
as of grantee to uses,
Secus, if the seisin rested at all in the husband,

(a) Chisholm v. Tiffany, 11 Q. B. U. C. 338.

(b) As to redemption by a widow see post p. 223. (c) Prec. Ch. 250.

(d) Per Esten, V. C., Norton v. Smith, in Appeal, 7 U. C. L. J. 263.

(e) Cro. Eliz. 503; 2 Black. Com. 132.

as on conveyance and reconveyance by way of mortgage.

The widow entitled, but chargeable as to her allotment, with one-third of the mortgage.

cuted a deed of conveyance to a purchaser in fee, who immediately after such execution, re-conveyed the lands to the vendor by way of mortgage, to secure the unpaid purchase money, it was held the widow of the purchaser was entitled to dower (a). But in such a case the dower allotted will be chargeable with a third of the interest of the mortgage, unless the dowress will pay a third of the mortgage debt; and the acquisition of the equity of redemption by the owner of the legal estate, or mortgagee, will not cause a merger so as to preclude him as against the dowress from insisting that the mortgage is on foot and unsatisfied (b).

When the parties desire *quoad* the purchase money, to be placed in the relative positions of mortgagor and mortgagee, and the wife of the purchaser declines to bar dower, the lands may be conveyed by common law conveyance or by grant, to some third person, to the use of the purchaser and his heirs till default in payment of the purchase money, and on default to the use of the vendor in fee: here on the happening of the event, viz., default, the use limited to the vendor will arise and the fee pass to him, and the wife of the purchaser not be entitled to dower; for the estate is limited to the purchaser, not simply in fee, but as a conditional limitation, restricted and liable to be defeated by the very terms of the conveyance (c). As to dower in regard to mines and the like, see *Bowles's case*, Tud. Lg. Ca. 2. ed. 69; *Stoughton v. Leigh*, 1 Taunt, 410; *Rex v. Miller*, Cowp. 619; *Dicken v. Hamer*, 1 Drew. & Sm. 284.

Not of partnership property.

A widow will be restrained *in equity* from claiming dower out of real estate purchased with partnership property in the name of her husband, or in the joint names of him and his co-partners, for the purpose of partnership in

(a) *Potts v. Meyers*, 14 Q. B. U. C. 499; *Norton v. Smith*, 20 Q. B. U. C. 213; s. c. in appeal, 7 U. C. L. J. 263.

(b) *Heney v. Low*, 9 Grant, 265; see, however, the judgment of Esten, V. C. as to the necessity of some evidence of express intention in the owner of the legal estate to keep alive the mortgage by assignment to a trustee or otherwise; see also as to dower on merger, *Bowles's case*, Tud. Lg. Ca. p. 58, 2 ed.

(c) *Watkins' Conv.* 9 ed., p. 103 and note.

trade (a); for such property is considered in equity as personal estate, and therefore not liable to dower, and moreover the husband is trustee for the partnership: the defence also can be raised by equitable plea at law (b). So also if the husband *before marriage* had contracted to sell or granted a right of purchase of, his real estate; here, if the contract or right were still subsisting on the husband's death, the widow, as against the party entitled to claim the benefit thereof, would be equally restrained *in equity* (c). In these cases, as also in the case of the widow of a trustee, or of a mortgagee when the equity of redemption is forfeited at law but is subsisting in equity (in which case the mortgagee is still in equity considered as trustee for the mortgagor,) the widow, it has been said by high authority (d), before the days of equitable pleas at law, is in strictness *at law* entitled to dower; for there was in the husband all that was required to entitle his widow to dower assuming him to have been seised in fee; but as remarked in one case on the point, "if the wife of a trustee or mortgagee were to be so ill-advised as to prosecute her *legal* claim, equity would undoubtedly saddle her with all the costs, and restrain the action at law." Now the defence could be set up by equitable plea.

Nor in case of contract to sell before marriage.

If husband, trustee or mortgagee.

The widow of a mortgagee will not be entitled to dower, where the estate of the mortgagee never becomes absolute, but is defeated by performance of the condition (e). When a mortgage has become absolute, and the equity of redemption is extinct at the time of the claim made for dower, by lapse of time and other circumstances, still if that state of things did not exist at the death of the husband (the mortgagee), and the equity of redemption was then still subsisting, his widow will not be entitled to dower (f).

(a) *Phillips v. Phillips*, 1 My. & K. 649; *Conger v. Platt*, 25 Q. B. U. C. 277; see also generally as to partnership property, 1 *White & Tud. Lg. Ca.* 3 ed. 166; *Bisset on Partnership*, p. 50.

(b) See form of plea *Conger v. Platt*, *supra*.

(c) *Parke on Dower*, 106 note o.; see post, p. 225.

(d) *Suz. Vend.*, ch. 12. s. 1; *Lewin on Trusts*, 5 ed. 299; *Park on Dower*, 100.

(e) *Ham v. Ham*, 14 Q. B. U. C. 497.

(f) *Flack v. Longmate*, 8 Bea. 420.

The right of the widow of a mortgagor is considered in treating of dower in equity.

Sole seisin.

The seisin must have been a *sole* seisin; therefore the widow of a joint tenant is not, though the widow of a tenant in common is, entitled to dower (a).

Exchange.

In case of exchange of lands, the widow is not entitled to dower in the land both taken and given in exchange: she is in such case put to her election as to the lands out of which she will be endowed (b).

Where dower is allowable, it matters not though the husband aliene or incumber the lands during the coverture; for he alienes them liable to dower.

The right in equity by Con. Stat. 84.

3. DOWER IN EQUITY, ARISING BY VIRTUE OF THE CON. STAT., C. 84, S. 1 (c).

No dower at Com. law out of trust estates.

Prior to the statute a widow was not entitled to dower out of trust estates of her husband, though they might have been equitable estates of inheritance in possession: this varied from the law as to curtesy which gave the husband a life interest in such estates of the wife, the other requisites to qualify the husband being present. It will be observed, the husband must *die* beneficially entitled, therefore if the husband alien there will be no dower. The old form as above given of limitations to uses to bar dower (hereafter explained (d)), and now rendered inoperative by this Act), affords an instance of that interest named in the statute as partly legal and partly equitable equal to an estate of inheritance in possession; the first life-estate to the purchaser and his remainder in fee being legal estates, and the intervening estate to a trustee for him being an equitable estate, and the three together equal to an estate of inheritance in possession.

Husband must *die* entitled.
Instance of estate partly legal and partly equitable which qualifies.

(a) *Haskill v. Fraser*, 12 C. P. U. C. 383; *Ham v. Ham*, 14 Q. B. U. C. 497.

(b) *Co. Litt.* 31 b; *McLellan v. Meggatt*, 7 Q. B. U. C. 554; see also *Towale v. Smith*, 12 Q. B. U. C. 555; *Stafford v. Trueman*, 7 C.P. U. C. 41, as to the proof required that the transaction was an exchange.

(c) See the statute ante p. 212.

(d) *Post.* p. 232.

A widow will be entitled to dower when the husband has conveyed in fee by way of mortgage before coverture, and dies entitled to the equity of redemption; that is, she may on redemption, claim dower. If the estate be subject to a term of years granted by way of mortgage before coverture, the widow of the mortgagor will be entitled to judgment at law for her dower, with, however, a *cesset executio* during the term (a), and she may redeem if she think fit. If the mortgage be after coverture, and the wife join to bar dower, and the husband die entitled to the equity of redemption, the widow will be entitled to redeem and claim dower; and in such case if she pay the whole mortgage she will be entitled to the whole estate till she shall have been reimbursed the whole redemption money, less so much thereof as shall be proportionate to her dower (b). Where the husband during coverture, made three conveyances in fee by way of mortgage, in only the last of which (securing £111) the wife joined to bar dower, it was held on a bill to foreclose after the death of the husband by a plaintiff as holder of all the mortgages, that the widow was entitled to redeem all, and hold the whole estate till she should be reimbursed the redemption moneys, less so much of the £111 as should be proportionate to her dower; or if she preferred to be let into her dower on payment of the £111 only, and if the prior mortgages should be afterwards satisfied, to be entitled to a conveyance of the whole estate to hold till she should be reimbursed the £111, less so much thereof as should be proportionate to her dower (c). But in a very recent case the widow had joined in a mortgage to bar dower; the estate was sold under decree in an administration suit, and after deducting the mortgage debt there was an available surplus of less than a third of the sum realized and value of the land; it was held that the widow was entitled to have the whole surplus set apart and invested for her dower, as being entitled to have the

Dower of an equity of redemption.

(a) *Chisholm v. Tiffany*, 11 Q. B. U. C. 338.

(b) *Thibodo v. Collar*, 1 Grant 147; *Saunderson v. Caston*, 1 Grant 349.

(c) *Thibodo v. Collar*, *supra*

estate exonerated and mortgage paid off out of personal or even real estate, as against creditors, to let in dower, and not merely to a third of the surplus as representing the value of the equity of redemption; and the only assets being the surplus, the creditors were postponed to the widow during her life (a).

Right to
redeem.

If the widow have barred her dower in a mortgage in fee and the husband convey his equity of redemption, or it be foreclosed, or sold under execution, she will not be entitled to redeem to let in dower, for the husband did not die beneficially entitled (b). On a bill for foreclosure against the mortgagor and his wife who joined to bar dower, the equity of redemption being reserved to the husband, the bill was dismissed as against the wife with costs as an unnecessary party (c). Nor can the widow redeem, having joined in a mortgage to bar dower, as against a purchaser under a power of sale contained in the mortgage; and if the husband mortgage (in fee) before coverture, though he die entitled to the equity of redemption, the widow will not be entitled to redeem as against a purchaser on a sale after the husband's death, under a power of sale in the mortgage (d). The right of a widow of a vendee who, on conveyance by the vendor, has re-conveyed by way of mortgage to secure the purchase money, in which the widow did not bar dower, is before treated of (e), as also the right of the widow of a mortgagee.

On husband's
contract to
purchase.

Where a husband contracts to purchase in fee, and dies, the widow will be entitled to dower as against the heirs-at-law (f); and even though the contract could not be enforced in law by reason of default in the purchaser in the terms of the contract, still, if it be a contract subsisting and capable of being enforced in equity, the widow will be entitled to dower, and in such cases even be entitled to call on the personal

Compulsion
by widow of

(a) Sheppard v. Sheppard, 14 Grant 174.

(b) Moffatt v. Thomson, 3 Grant 111.

(c) Moffatt v. Thomson, *supra*.

(d) Smith v. Smith, 3 Grant 451. (e) Ante p. 220.

(f) Craig v. Templeton, 8 Grant 483.

representatives of the deceased husband to administer and pay the purchase money and complete the contract. The case of a husband having contracted to purchase, and the widow being entitled to dower in equity, proceeds on the principle that, in equity, what is agreed to be done is to be considered as done, the money considered as actually converted into land, and the vendor from the time of the contract a trustee for the purchaser, who is thenceforth deemed beneficially entitled: and by application of the same principle in the converse case, viz., that of a husband who *before* marriage has contracted to sell, and married before payment of the purchase money or conveyance, here though as above mentioned, the widow would at law be entitled to dower, still equity will restrain an action at law at the instance of the purchaser; for by the contract the land in equity is deemed as converted into money, and the vendor trustee for the purchaser (a). So again, a widow may, on the principle above mentioned, be entitled in equity to dower out of what would be personal estate at law: thus, under certain circumstances, money vested in trustees with express injunctions to lay out the same in the purchase of lands in fee simple or fee tail for the benefit of the husband and his heirs, even though never so laid out during the husband's lifetime, will nevertheless be looked on in equity as actually converted into lands, and the delay of the trustees in doing what they ought to have done shall not prejudice the widow (b). On the same principle, a husband will in equity, be entitled to curtesy out of personal estate at law, as if money be stipulated to be laid out in lands to be settled on a *feme covert* in fee or in tail, the husband is entitled to curtesy, though no purchase be actually made in the lifetime of the wife; and he will be decreed the interest of the money till a purchase can be found, and when the investment can be made he will have a life estate in the lands (c).

its completion.

Principle, conversion.

On same principle, widow barred on contract to sell.

Entitled in equity to dower out of what may be personal estate at law.

So also husband entitled to curtesy out of personalty.

(a) Lloyd v. Lloyd, 4 Dru & War, 370.

(b) Lewin on Trusts, 5th ed. p. 676.

(c) Lewin on Trusts, 5th ed. pp. 524, 676.

Liabie for
waste.

Clearing wild
lands?

Tenant in dower is liable for *waste*. It is by no means clear that the cutting of timber for the purpose of cultivating wild lands is waste, and as regards tenancy in dower, the question, since the late Act of 32 Vic., is of little importance, though in cases of tenancy by the curtesy and other life estates it is still important (a).

How far the
English law of
waste applies
here, as to
clearing wild
lands.

(a) It is manifest that in many cases, especially in respect to wild lands, the interest of the life tenant might not only be a worthless, but even *damnosa hereditas*, unless he be allowed to cut the timber and clear the land, for the life tenant is bound to pay off the taxes, at least if under the same title he takes other profitable lands: *Biscoe v. Van Bearle*, 6 Grant, 438; *Weller v. Burnham*, 11 Q. B. U. C. 90; see also per *Blake, C.*, in *Chisholm v. Sheldon*, 1 Grant, 318; *Lawrence v. Judge*, 2 Grant, 301. In one case the question was raised; it was an action by the remainder-man against the tenant for life for felling trees; the plea was that the trees were felled for the purpose of clearing the land, and improving and cultivating the same according to the custom of good husbandry, and of Upper Canada, and that thereby the land was enhanced in value; the main question was not decided, for the plea did not necessarily call for it, as it was bad in not setting out that the land in fact was cleared of the trees cut down, and it was consistent with the plea that the trees were left lying to encumber the land. On the one hand it may be urged that the rendering the property more valuable will not the less prevent the cutting timber from being waste according to the adjudged cases; thus, the converting one species of edifice into another, though it is improved in value, is waste. The principle however in such cases appears to be, that the tenant shall not as against the remainder-man or reversioner, impair the *evidence of title* by altering the character or nature of the estate, as in England at least, property is frequently conveyed by specific reference to and description of its character. It may as regards the question of amelioration, perhaps also be urged, that though looking only at the present, the reversioner or remainder-man may be benefited by bringing timbered lands into cultivation in case his estate should by death of the life tenant shortly fall into possession, still that is matter of speculation and might be otherwise, for the life tenant might well live twenty or fifty years, and there can be little doubt that in such case it would have been far better for those in remainder or reversion that the estate should come then into their hands as timbered lands and virgin soil, than as perhaps an exhausted farm; the fact also that we are entirely dependent on foreign supply for all fuel except wood might be urged. On the other hand, public policy and the interests of the country require the encouragement of agriculture, and acting on this, the cutting of timber on wild lands in order to bring them into cultivation, has, throughout the United States been held not to be waste: *Washburn Rl. Prop.*, 2nd ed., 108; 4 Kent Com. 76. In *Bac. Ab. Waste*, ch. 1, is this note—"Some say that ploughing must be prohibited by covenant to pay so much an acre, for that absolute restraint from ploughing is void."

In *Rob. & Harr. Dig.*, title *Waste*, referring to *Taylor v. Taylor*, E. T. 1 Wm. 4, not reported, it is said: "An action on the case for waste may be brought under 6 Ed. 1, ch. 5, by him in remainder or reversion for life or years; and where land was devised for life with a reservation of

4. HOW DOWER MAY BE BARRED OR DEFEATED, OR THE RIGHT THERETO CONVEYED.

A widow may be barred of her dower not only by elopement, divorce, and other disabilities before mentioned, but also by detaining the title deeds or evidences of the estate from the heir, until she restores them (a). Detinue of charter.

By the Statute of Gloucester (b), if a dowress aliens the land assigned her for dower, she forfeits it *ipso facto*, and the heir may recover it by action (c): by this must be understood the case of a dowress conveying by *feoffment* a greater estate *than for her own life* (d): such mode of conveyance prior to 14 & 15 Vic. ch. 7, Con. Stat. ch. 90, sec. 3. Forfeiture by conveyance.

the oak timber thereon, it was held that a power to *dispose* of other descriptions of timber was not thereby implied, and that the tenant for life was guilty of waste in *disposing* of such other timber:" but that this should be waste is quite consistent with the ground on which the plea in *Weller v. Burnham*, supra, was held bad, for a mere sale or cutting down of timber undoubtedly would be waste; it is when it is followed up by a *clearance for cultivation* that the doubt arises.

Admitting that the land is meliorated, it may well be said that prevents the clearing of land being waste, which otherwise, *prima facie*, it might be. Thus it is said: "*En tiel lieux ou per le custom del pais l'airer de pree est bon husbandry, et pur melioration del pree, la, l'airer de ceo n'est wast*"—2 Roll. Ab. 814. pl. 5: and so in an action for ploughing up an ancient meadow, *Simmons v. Norton*, 7 Bing. 640, where the plea was *nul wast*, and the defendant sought to give in evidence that it was according to good husbandry and for the melioration of the land, which was rejected as not being specially pleaded, *Tindal, C. J.*, says,—“I do not say that that which is *prima facie* waste may not be altered in its character, if under particular circumstances it should appear to have been done for the melioration of the lands, but if that be so, it must be expressly stated on the record.” In England even the question as to whether the felling of certain kinds of trees be waste, depends sometimes on whether such trees be scant or not. Lord Coke says, Co. Litt. 53a.—“Oak, ash, and elm, these be timber trees in all places, . . . also, in countries [meaning places in England, Ed.] where timber is scant, and beeches or the like are converted into building for the habitation of man, or the like, they are all accounted timber:” so that waste as to trees appears to be governed by circumstances: see also, *Chisholm v. Sheldon*, per Blake, C., 1 Grant, 318; *Lawrence v. Judge*, 2 Grant, 301. It must be borne in mind, there is in the case of a lease reserving rent an argument in favor of the tenant, which may not exist where the estate comes by act of law. for in the former case it may be implied perhaps, that the intention of the parties was that the lands might be cleared.

(a) *Park on Dower*, 295, 296: see also *Draper on Dower*, 86.

(b) 6 Ed. 1, c. 7. (c) 2 Black, Com. 136. (d) 2 Inst. 309.

would pass such greater estate *by wrong*, and the penalty was forfeiture of all estate.

Jointure and ante-nuptial settlement.

Definition.

Another method of barring dower is by jointure, as regulated by the Statute 27 Henry 8, ch. 10, or by ante-nuptial settlement in lieu of dower. A *jointure*, which strictly speaking means a joint estate, limited to both husband and wife, but in common acceptation extends also to a sole estate limited to the wife only, is thus defined by Sir Edward Coke: "a competent livelihood of freehold for the wife, of lands and tenements, to take effect in profit or possession presently after the death of the husband, for the life of the wife at least." Before the Statute of Uses the greater part of the land of England was conveyed to uses, and the *cestui qui use* then stood in much the same position as a *cestui qui trust* after the Statute, and had but an equitable beneficial interest. Now though a husband had the *use* of lands in absolute fee simple, yet the wife was not entitled to any dower therein, he not being *seised* thereof; wherefore it became usual on marriage, to settle by express deed some special estate to the use of the husband and his wife for their lives, in joint tenancy or jointure, which settlement would be a provision for the wife in case she survived her husband. At length the Statute of Uses ordained that such as had the *use* of lands, should to all intents and purposes be reputed and taken to be absolutely *seised* and possessed of the soil itself. In consequence of which legal seisin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure, had not the same statute provided, that upon making such an estate in jointure to the wife before marriage, she shall be forever precluded from her dower. But then these four requisites must be punctually observed: 1. The jointure must take effect immediately on the death of the husband. 2. It must be for her own life at least, and not *pur autre vie*, or for any term of years, or other smaller estate. 3. It must be made to herself, and

A bar under Stat. of Uses.

Requisites of jointure.

no other in trust for her. 4. It must be made, though it need not in the deed be expressed to be (a) in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her *after* marriage, she has her election *after* her husband's death, as in dower *ad ostium ecclesiæ*, and may either accept it or refuse it, and betake herself to her dower at common law; for she was not capable of consenting to it during coverture. And if by fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted or turned out of possession, she shall then (by the provisions of the same Statute) have her dower *pro tanto* at the common law (b).

A more usual mode, in Ontario at least, of preventing right of dower in present or future acquired property, is by settlement or agreement before marriage, by which the intended wife accepts any provision in her favour which is declared to be in lieu of dower in such present or future to be acquired property; and if the intended wife were adult at the time of the agreement, the inadequacy, precariousness, or failure of the provision for her will not prevent her being barred: on this point Lord St. Leonards (c) thus expresses himself—"If the present were a jointure operating as a bar under the Statute of Uses, [above explained—ED.] the case would have been governed by section 7 of that Statute; but *in equity the bar rests solely on contract*, and my opinion is that in this court, if a woman, being of age, accepts a particular something in satisfaction of dower, she must take it with all its faults, and must look at the contract alone; and cannot in case of eviction come against one in possession of the lands on which otherwise her dower might have attached; this has nothing to do with the performance of covenants or the like. . . . My conclusion is, that the plaintiff has accepted in lieu of dower

Bar by antenuptial settlement.

Though inadequate, or it fails.

For the bar is good by the contract.

(a) *Gilkison v. Elliott*, 27 Q. B. U. C. 95. (b) 2 Black. Com. 138.

(c) *Dyke v. Rendall*, 2 DeGex. Mac. & Gor. 209; see also *Earl of Buckingham v. Drury*, 2 Eden 60; *Corbet v. Corbet*, 1 S. & S. 612; see also, *Tud. Lg. Ca.*, 2 ed., p. 63, 64.

payment of money at least, and that she is also concluded by the acceptance of the bond, and that, though the bond was not satisfied, she has no right to resort to lands of her husband bought and sold during marriage." It must be borne in mind however, that the above remarks were made in a case in which the widow was seeking to enforce her dower, not against the heir at law, or a devisee, or a volunteer, but against a purchaser for value, who on purchase was aware, and perhaps relied on the settlement and agreement of the wife to accept the husband's bond in lieu of dower. Still, however, it would appear on the whole that the acceptance by an adult woman before marriage of any provision in lieu of dower, will though it fail, bar her as a matter of *contract* as against the husband and those claiming under him.

Infants barred at law by legal jointure, but not by ante-nuptial agreement,

but bound in equity by good equitable jointure.

Infants may be barred at law by sufficient legal jointure under the Statute of Henry 8, as above explained. If the jointure be *competent* it will be good though it be not of the value of the dower (a): and though at law an infant may not be bound by her ante-nuptial agreement to accept a provision in lieu of dower, still in equity a provision made for an infant on her marriage, at least if with the assent of her father or guardian, and in all respects as certain, secure, and substantially equivalent to a good legal jointure, would be sufficient as a good *equitable jointure*, to restrain her from enforcing her legal right to dower (b). A mere precarious and uncertain provision, however, which she might never enjoy, though it might bar an adult on her *contract* to accept it as above mentioned, would not bar in case of an infant (c): thus a settle-

(a) *Earl of Buckingham v. Drury*, 3 Bro. P. C., Toml. ed. 492; *Drury v. Drury*, 4 Bro. C. C. 506, note; *Harvey et ux. v. Ashley et al.*, 3 Atk. 607.

(b) See cases last note; Tul. Lg. Ca., 2 ed., p. 63; see also Davidson Conv., vol. 3, 2 ed., p. 728 note a, where the law is fully discussed; Sugd. Statutes, 2 ed., 246; but see *Fisher v. Jameson*, 12 C. P. U. C. 601, in which case, however, the provision made was precarious, insecure, and failed; see also this case in Appeal, 2 Error & Appeal Reports, 242, the remarks of Esten, V. C.

(c) *Carruthers v. Carruthers*, 4 Bro. C. C. 500, 513; *Smith v. Smith*, 5 Ves. 188; *Fisher v. Jameson*, supra.

ment of an estate on an infant for life, after the death of the intended husband and of some *third person*, will not be a bar as a good equitable jointure; for the third person might survive not only the husband but the wife who might therefore never take anything.

Whether a provision, which is not valid as a good *legal* jointure under the Statute of Henry 8, but is still substantially equivalent to it, would bar an infant in equity, if made before marriage *without assent* of her father or guardian, is not perhaps quite clear. In one case (a) it is said: "A female infant is bound by the settlement made on her marriage as to dower and thirds, not by force of her agreement in the settlement, but by reason of the consent of her parents and guardians and of the Statute of Henry 8." Perhaps if the equitable jointure be in all respects adequate and tantamount to a good legal jointure; as for instance, if it complied in all respects with what is required under the Statute, except that it was an equitable estate of freehold instead of a legal estate, the infant would be barred, and be restrained in equity from prosecuting her claim at law: and that in such a case equity would follow the law; and that as the infant would be barred at law without her assent or the assent of parents or guardians, so also she will be barred in equity, if the provision only failed in being a good legal bar, because it was an equitable estate (b). It may well be contended that the assent of parents and guardians is not requisite for the protection of the infant, as the statute is a sufficient protection; and that the absence of such assent will not, on the one hand, render an adequate equitable jointure invalid, and on the other hand, that the presence of such assent will not render an inadequate one valid.

But if made
without assent
of parents?

(a) *Simson v. Jones*, 2 Russ. & Myl. 377; *Stamper v. Barker et al.*, 5 Madd. 157.

(b) *Drury v. Drury*, supra, Harg. Co. Litt. 36 b, note 7; *Williams v. Chitty*, 3 Ves. 545; *Corbet v. Corbet*, 1 S. & S. 612; *Sugden Statutes*, 2nd ed. 246; *Jamieson v. Fisher*, 2 Err. & App. Repts. 242, per *Eaten*, V. C.

Assent of parents not material, if jointure bad.

The acceptance before marriage by an infant of an insufficient equitable jointure, or of one which has failed, would not suffice in equity, to deprive her of her legal right to dower, though accepted *with the assent* of parents or guardians: in other words, the concurrence of parents or guardians will not give force to a settlement accepted by an infant, which would not have been binding on her without such occurrence (a); for "a competent livelihood" is required at law: an incompetent jointure, or one that turns out worthless, would not be a good legal bar, under the Statute of Henry 8, and the courts of equity proceed only by analogy to this, unless indeed they can proceed and bar as on a matter of *contract*, (as in the case of an adult as above mentioned), which ground is insufficient where it is an infant who contracts to her own disadvantage.

Former mode of conveyance so that dower never even attached.

A conveyance to a husband may be so drawn, as that he may reconvey without the dower of his wife attaching. A form of such conveyance once used, was by common law conveyance to convey to the purchaser (the husband) and his heirs to hold to such uses as he should appoint, and in default of and till appointment to the use of him and his assigns during his life, without impeachment of waste, and on the determination during the life of the purchaser of that estate, by forfeiture or otherwise, to the use of the dower trustee and his heirs, or executors and administrators during the life of the purchaser, in trust for him and his assigns, and after the determination of the estate limited to the trustee to the use of the heirs and assigns of the purchaser. Under such limitations the husband, by exercise of the power, had full control, and if he died without exercising it, dower never even *attached*, for the only estate of which the husband would be seised *in possession*, during his life, would be the life-estate; and the remainder in fee is prevented from becoming an estate of inheritance *in posses-*

(a) *Simson v. Jones*, 2 Russ. & My. 377, 365; *Field v. Moore*, 7 DeG. M. & G. 691, 706, 709; see *Harvey et ux. v. Ashley et al.*, 3 Atk. 607; *Ainslie v. Medleycott*, 9 Ves. 13; *Earl of Buckingham v. Drury*, 2 Eden 60; *Corbet v. Corbet*, 1 S. & S. 612; *Fisher v. Jameson*, 12 C. P. U. C. 601, and the text books referred to on prior page, note b.

sion by force of the rule in Shelley's case, and the law of merger, in consequence of the intervening estate to the trustee (a). Such limitations as the above will however, now no longer suffice, unless indeed the husband exercised the power, for by Con. Stat. ch. 84, s. 1, "When a husband dies beneficially entitled to any land for an interest which does not entitle his widow to dower out of the same at law, and such interest whether wholly equitable, or partly legal and partly equitable, is an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same lands." Under such limitations as the above, the estate, it will be observed, is partly legal and partly equitable, equal to an estate of inheritance in possession.

Another form sometimes adopted, and which can yet be adopted with effect, so far as to enable the husband to convey free of dower, was to convey to the purchaser in fee (the husband), to such uses as he should appoint, and in default of and till appointment, to him in fee; (the limitations were usually more complex than as above in fee, but it simplifies so to state them) (b). Under such limitations, dower does attach, subject to be divested, on exercise of the power of appointment; for the husband, till exercise of the power is seised of an estate of inheritance in possession; but on execution of the power, the appointee (a purchaser from the husband), comes in as if named in the conveyance to the husband (in consequence of the peculiar operation of such powers and appointments), and so paramount to the right of dower of the wife. The operation and effect of these conveyances is thus: A conveys by common law conveyance, or by grant, to B (the husband), in fee, to such uses as he (B) shall by deed appoint, and in default of and till appointment, to him (B) in fee; B sells to C, and conveys and appoints the estate to C in fee, reciting the power of

Now useless
by Con. Stat.
84, s. 1.

Another form
can yet be
adopted under
which right
will attach,
subject to be
defeated.

(a) Watk. Conv. 9th ed. p. 91, and notes.

(b) As to the covenants for title, 1 Smith, Lg. Ca. 5th ed. p. 64. See forms of conveyances, Davidson's Conv. vol 2, 169-173.

appointment: the whole transaction is now to be read as though by the first conveyance, A had conveyed to B and his heirs, to the use of C and his heirs; which would under the Statute of Uses vest the legal estate and fee in C, and so paramount to the right of dower (*a*). Of course if B die without exercise of the power, then if the limitations be in the simple form, put, the widow of B would be entitled to her dower, which was never divested (*b*).

Devise or bequest in lieu of dower.

The acceptance by a widow of what is given to her expressly in lieu of dower is a good bar to her claim for

(*a*) That executions may thus be defeated—see *infra*, note *b*.

(*b*) There are probably few points in the law of real property which have been the subject of more conflicting weighty authority than that stated in the text. At one time it was supposed that inasmuch as an estate limited in default, or till exercise of a power, is a vested estate, and therefore as dower did attach, that it could not be defeated by subsequent exercise of the power. It seems however quite clear that it can be so defeated; see *Park on Dower*, 186; *Sugden on Powers*, 8th ed. 194, 479; see also *Ray v. Pung*, 5 B. & Ald. 561; s. c. 5 Madd. 310; and as to judgments and executions being thus defeated, *Doe d. Wigan v. Jones*, 10 B. & C. 459; *Tunstall v. Trappes*, 3 Sim. 300. It was however on another point that the chief difficulty arose, viz., whether, where the estate is not limited to some *third person* to uses, but directly to the purchaser himself as stated in the text, so that he is *in by the common law*, any uses declared in his favor or on his appointment are not void. It was said that a common law seisin and a use or power cannot be co-existent in the same estate in the same person; that the power would be merged in the fee; that the purchaser being in, and having the whole fee, as at common law, any further uses declared in *his* favor or on his appointment were simply nugatory and void; that in order that any such uses should have any effect, it would be requisite to separate the seisin and the use, as by conveyance to some *third person* to such uses as the purchaser should appoint, and till appointment to the use of the purchaser. These views were strongly advocated by men as eminent as Mr. Saunders and Mr. Preston: see *Saunders on Uses*, Vol. 1, p. 155; *Preston Conveyancing*, Vol. 2, p. 482; Vol. 3, pp. 265, 271, 494: see also the *first* part of the note to *Watkin's Conveyancing*, 9th ed. p. 281; and *Goodill v. Brigham*, 1 B. & P. 192. This constitutes a formidable array of authority against the doctrine in the text; on the other hand there is no less weighty and more modern authority in its favour. Lord St. Leonards (*Sugden*) in his work on *Powers*, 8th ed. p. 93, reviews all the authorities, and comes to the conclusion that an estate under an appointment created as named in the text can well take effect; and of this opinion also is Mr. Coventry: see his note in brackets to the first part of the note in *Watkin's Conveyancing* above referred to; see also per Draper, C. J., in *Lyater v. Kirkpatrick*, 26 Q. B. U. C. 228. The conveyancer may avoid all question by limiting the estate by common law conveyance, or by grant under Con. Stat. ch. 90, to some third person in fee to such uses as the purchaser may appoint, and in default of and till appointment to the use of the purchaser and his heirs. It is submitted however that this precaution is quite unnecessary: see also *Gorman v. Byrne*, 8 Ir. C. L. Rep. 394.

dower : so also if it can be clearly implied from the will that the provision was to be in lieu of dower ; " it is not enough to say that on the whole will it is fairly to be inferred that the testator did not intend that his widow should have dower, in order to justify the Court in putting her to her election, it must be satisfied that there is a positive intention to exclude her from dower, either express or implied " (a). The mere gift of an annuity out of the estate will not render it compulsory on the widow to elect between it and her dower, she will be entitled to both.

Parol evidence of the intention of the testator to exclude dower is not admissible.

In order that the widow be barred by acceptance of the provision in lieu of dower, there must have been an opportunity to elect, and the acceptance must not have been in ignorance of the provision being in lieu of dower (b).

It has been said that in order that the election to take should be a defence *at law*, the intention that the provision should be in lieu of dower must be expressed on the face of the will, and not left to be gathered or inferred from it, in which latter case, before equitable pleas were allowed at law, it was said the defence was in equity only (c). In the latter case therefore it will be advisable to plead the election by way of equitable plea (d).

Acceptance by the widow of a conveyance from the heir-at-law in lieu of dower, is a good bar, so also of a bond (e).

The action for dower *unde nihil habet* might be barred by the Statute of Limitations, Con. Stat. ch. 88, s. 1 (f).

The Act of 24 Vic. ch. 40, also gave a bar.

Acceptance of provision in lieu of dower, if made in ignorance of it being in lieu, no bar.

Pleading election to take.

Satisfaction by conveyance, &c. from heir-at-law.

Bar by Stat. of Limitations, Con. Stat. c. 88, s. 1

(a) Gibson v. Gibson, 1 Drew. 51; see also generally Baker v. Baker, 25 Q. B. U. C. 448; Walton v. Hill, 8 Q. B. U. C. 562; Pulker v. Evans, 13 Q. B. U. C. 546; Parker v. Sowerby, 4 De G. M. & G. 321; Baker v. Hammond, 12 Grant 485; McLennan v. Grant, 15 Grant 65; Fairweather v. Archibald, 15 Grant 255.

(b) Sopwith v. Maughan 30 Bea. 235.

(c) Walton v. Hill, 8 Q. B. U. C. 562, per Robinson, C. J.

(d) As to pleading the election see Walmsley v. Walmsley, 26 Q. B. U. C. 392; Breakenridge v. King 4 Q. B. U. C. O. S. 180, and Walton v. Hill, *supra*.

(e) Germain v. Shuert, 7 C. P. U. C. 316.

(f) German v. Grooms, 6 Q. B. U. C. 414; McDonald v. McIntosh, 8 Q. B. U. C. 388. The authority of the cases is sustained by Draper, C. J.,

Prior to the Stat. of Wm. 4, Con. Stat. ch. 88, there was no limitation to the suit for dower (a).

Limitation to
action by 82
Vic. c. 7, s. 22.

By the Act of 32 Vic., ch. 7, s. 22,—

"No action of dower shall be brought but within twenty years from the death of the husband of the demandant."

No provision is made for cases of disability.

Limitation by
Con. Stat. c.
84, s. 2, where
husband was
disseised.

When the husband's interest was a mere right or action, the time which would bar the husband will also bar the wife, notwithstanding her coverture, and if the bar against the husband be not complete on his death, the time run against him will count as against the widow, for the Con. Stat. ch. 84, s. 2 (b), which in such case gives her dower in virtue of such right in her husband, limits the period of suit for dower to that within which such right might be enforced.

Con. Stat. c. 88,
s. 18, limits
recovery of
arrears of dower
to 6 years.

By Con. Stat. ch. 88, s. 18, "no arrears of dower, or damages on account of such arrears shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit."

Bar by deed.

Dower may also be barred by deed of the married woman executed as required by the statute authorizing this mode of bar (c).

Prior to the Stat. 37 Geo. 3, ch. 7, the mode of bar was by fine or recovery, that by fine being the most usual.

Fines and recoveries were abolished with other real actions, except in dower, by 4 Wm. 4, ch. 1, Con. Stat. ch. 27, s. 78, and the statutory bar above remains. The in-

in *Begley et ux. v. St. Patrick's Association*, 23 Q. B. U. C. 395, and by *Stuart, V. C.*, in *Marshall v. Smith*, 34 L. J. Ch. 189, which is the only English case on the point, and *Laing v. Avery*, 14 Grant, 33. In *Leach v. Shaw*, 8 Grant, 494, *Esten, V. C.*, expressed doubts as to dower being within the act by reason of the definition given to the word "land" in the interpretation clause, which he said seemed "studiously framed to exclude such an estate"; he thought however, that dower might be within the general meaning of sec. 1 of the Con. Stat., and held himself bound by the two cases first cited. In those cases a difficulty was felt in holding dower to be within sec. 1 inasmuch as sec. 2, which proposes to define the periods at which the rights barred by the act shall be deemed to have first accrued does not take in the case of dower. It has been held, however, that this will not prevent the application of sec. 1; *James v. Salter et al.*, 3 B. N. C. 544; *Grant v. Ellis*, 9 M. & W. 124; see also 4 Rep. 2 a.

(a) Per *Draper, C. J.*, in *Begley v. St. Patrick's Association*, *supra*. That the Statute of William applies in cases of dower, see *supra*, note f.

(b) See the Statute, ante p. 212. (c) See the Statute, ante p. 212.

convenience of the mode of bar by fine induced the Legislature at an early period to introduce a more simple mode of bar; the first Act, 37 Geo. 3, ch. 7, by analogy to the mode of bar by fine required an examination in all cases. By subsequent legislation however, examination is no longer requisite where the husband is a party to the deed, but continues requisite when he is not a party; a distinction based on no sufficient reason, and which, considering the object of the examination, should rather be the other way (*a*).

The early acts as to bar.

A married woman cannot without the concurrence of her husband, notwithstanding examination and certificate under the dower acts, release her right to dower in lands of her deceased former husband (*b*). And it is apprehended, although this was so decided before the Con. Stat. ch. 73, settling the property of married women to their separate use, and although the right released is a mere right of action, and no estate in the land, that even since that act, the husband should be a party (*c*). It may be questionable also whether such a release would be valid if executed under the Stat. 29 Vic. ch. 28, s. 22, which authorizes a release under a power of attorney from a married woman, there being an examination and certificate endorsed on the power as required by the dower Act (*d*). This question of *release of the right of action* to the tenant of the freehold is of course very different from that of *assignment of the right to a stranger*, and it may well be that the widow as a *feme sole* before a second marriage, or jointly with her husband with the proper formalities if married again, may be able effectually to release to the tenant of

Release by married woman of dower in lands of deceased husband.

Assignment of the right to a stranger.

(*a*) See remarks of Sir J. B. Robiison, C. J., in *Howard v. Wilson*, 9 Q. B. U. C. 450.

(*b*) *Howard v. Wilson*, 9 Q. B. U. C. 450; 10 Q. B. U. C. 186; s. c. see also *McGill v. Squire*, 13 Q. B. U. C. 550

(*c*) See remarks as to Con. Stat. ch. 85; see also per A. Wilson, J., *Miller v. Wiley et al.*, 16 C. P. U. C. 542, and *Heward v. Scott*, 2 Cooper, Cha. Cham. Rep. 274.

(*d*) See as to execution under a power of attorney from the wife, the remarks on the Stat. 29 Vic. ch. 28, s. 22, in treating of Con. Stat. ch. 85.

Decisions as to acknowledgments and certificates.

the freehold (a), and yet that the right should not be, as it has been held not to be (b), assignable to a stranger.

Many of the decisions on Con. Stat. ch. 85 (c), enabling married women to convey their real estate are applicable to this act as regards the effect of the language of the certificate (d), the evidence and effect of the certificate as evidence (e), and the joining of the husband (f).

32 Vic. c. 7, s. 23, remedies informalities in certificates,

This Act is not, as in Con. Stat. ch. 85, confined to adults.

The Act of 32 Vic. ch. 7. s. 23 (g), which takes effect on and after the first day of February, 1869, alluding to actions for dower, provides as follows :

23. "No such action shall be hereafter maintained in case the demandant has joined in a deed to convey the lands, or to release her dower therein to a purchaser for value, although the acknowledgement required by law at the time may not have been made or taken, or though any informality may have occurred or happened in the making, taking or certifying such acknowledgement."

Suits pending at the time of the passing of the Act are excepted from the operation of this clause.

Questions arising on s. 23 of 32 Vic. ch. 7.

On the construction of this section, the following questions may arise :—1st. What is meant by joining in a deed? 2nd. What is the extent of the word purchaser? 3rd. Does the act virtually repeal sections 6, 7, 8, 9, and 10, of the Con. Stat., and the necessity for acknowledgement as named in those sections after as well as before the passing the act?

What is meant by joining in a deed to release dower.

As regards the first point it is to be observed the Con. Stat. s. 4 authorizes a married woman to bar by *joining with her husband* in a deed in which a release of dower is con-

(a) Ante pp. 74, 75.

(b) *McAnnany v. Turnbull*, 10 Grant, 298 ; see however, p. 69, note c, and p. 70 ; see also post p. 240.

(c) See the cases commented on in treating of that Act, p. 260.

(d) *Monk v. Farlinger*, 17 C. P. U. C. 41 ; *Stayner v. Applegate*, 8 C. P. U. C. 451 ; *McNally v. Church*, 27 Q. B. U. C. 103.

(e) *Monk v. Farlinger*, supra ; *Jackson v. Robertson*, 4 C. P. U. C. 272 ; *Allison v. Rednor*, 14 Q. B. U. C. 459 ; *McCammon v. Beaupre*, 25 Q. B. U. C. 419 ; *Orser v. Vernon*, 14 C. P. U. C. 573 ; *Robinson v. Byers*, 13 Grant, 388.

(f) *Doe d. Bradt v. Hodgins*, 2 Q. B. U. C. O. S. 213.

(g) See the Act at the end of this chapter.

tained, and by section 5 she can also bar by executing *either alone or jointly with other persons*, a deed, &c., to which her husband is not a party containing a release of dower; if the release is to take effect otherwise than by joining with the husband in a deed, there must be an examination and acknowledgement (the necessity for which in that case more than the other is not apparent) (a). Now where the wife joins with the husband no acknowledgement is requisite, and it is well known in practice that in the great majority of cases, where acknowledgement is required by section 6, it is when the wife executes alone joining with no one; if therefore, this section is to be read according to its strict grammatical construction, as applying where the claimant joined in a deed to release dower, and so relate only to the joint execution named in section 5 of the Con. Stat., it will fail to take in the majority of cases, viz., those of sole execution by the married woman, for which there was the chief necessity to provide. What the Legislature intended to provide for were the cases wherein a married woman *without releasing dower* (b), joined with her husband as a conveying party of the land itself, (and there were many such conveyances), and also those cases wherein her husband, who conveyed by a separate instrument, was no party to the release, and the necessary acknowledgement was defective. This section also presupposes that the inchoate right to dower was not alone the subject matter of the purchase, but that some interest of the husband was chiefly involved as to which the wife was extinguishing her right (c).

In order that a release by deed poll should be within the Act, it would require that the words "joined in" should receive a different construction as applied to such a release, to that which it has as applied to conveying with the hus-

(a) See remarks of Robinson, C. J., in *Howard v. Wilson*, 9 Q. B. U. C. 450.

(b) Such a conveyance, without a release of dower therein, would not be within the power conferred on married women to bar dower by 2 Vic. ch. 6, s. 3, Con. Stat. ch. 84, s. 4.

(c) *Miller v. Wiley et al.*, 17 C. P. U. C. 368; s. c. 16 C. P. U. C. 529; ante p. 69, n. c. and p. 237.

band, and that in the former case they should be read as "executed," and probably they would receive that construction.

What is meant by the words "purchaser for value."

As regards the extent of signification of the words "purchaser for value," it may be observed that the former Act of 24 Vic. ch. 40, s. 19, which is worded much as section 23 of this Act, referred merely to a "purchaser:" it would seem, however, that the variance is not material, unless, indeed, the word "purchaser" in the former Act must be taken, not in its ordinary acceptation, but in its strict legal sense, as including any one who comes to an estate by his own act or agreement and not by descent, and so include a volunteer (*a*). The Registry Act speaks of "purchaser or mortgagee for valuable consideration," and the Act of 27 Eliz. ch. 4, of purchaser "for money or any good consideration," and the decisions under those Acts (*b*) would seem to be applicable to this section. As before mentioned, it has been said (*c*) that the purchaser to be within the Act must not be a stranger acquiring the mere right of dower. It is conceived that an acquirer for value, given or agreed to be given, of the whole estate, or of any partial or limited interest in it, absolutely or conditionally, is within this section; and that it would clearly include such as a mortgagee, or lessee at rack rent.

Does sec. 23 virtually abolish necessity for future acknowledgments?

As regards the third point, the question is whether this section relates to deeds executed after the passing of the act, in which case it would virtually repeal the former law as to necessity for acknowledgment, at least where the releasee is a purchaser, and (where the release is by deed poll), subject to the question above referred to as to the construction to be placed on the words "in case the claim-

(*a*) Bl. Com. 241; Co. Litt. 18 *b*.

(*b*) As to the Act of 27 Eliz., see notes to Twynen's case, Smith Lg. Ca., 6th ed. 25, 27; Sug. Vend. 14th ed. 712; Chapman v. Emery, Cowp. 279; Goodright v. Moses, 2 Bl. 1019; Hill v. Bishop of Exeter, 2 Taunt. 69; Douglas v. Ward, 1 Ch. Ca. 79. As to the amount given to constitute value in reference to the worth of the property, see 1 P. W. 282; Wilson v. Shier, 6 Grant 630; Doe v. James, 16 East. 212; Sug. Vend. 13th ed. 587, note *g*. See also Perse v. Perse, 7 Cl. & F. 317; Owen v. Owen, 3 H. & C. 88.

(*c*) Miller v. Wiley, *supra*.

ant joined in a deed," &c. The commencement of this section would be broad enough to operate on deeds executed after the Act and so let in the necessary consequence, viz, that no longer is any acknowledgment required by law: it is submitted however that the expression "though the acknowledgment *required by law at the time* may not have been made or taken, or though any informality may have occurred, &c.," shews that the Legislature did not contemplate the acknowledgment not being necessary in future; and that for the repeal of the former statutes as to acknowledgment more direct enactment is requisite (a).

The nature of the right before and after the death of the husband, its capacity of being released to the tenant of the freehold, and of being assigned to a stranger, the mode how, and as to whether the assignee can sue and enforce the right in his own name is elsewhere treated of (b).

As to conveyance of right to dower to a stranger, and as to release to tenant of the freehold.

32 VIC. CH. 7.

AN ACT TO ALTER THE LAW OF DOWER, AND TO REGULATE PROCEEDINGS IN ACTIONS FOR THE RECOVERY OF DOWER IN UPPER CANADA.

Her Majesty, by and with the advice and consent of the Legislative Assembly of Ontario, enacts as follows:—

1. The twenty-eighth chapter of the Consolidated Statutes of Upper Canada, intituled: *An Act respecting the procedure in Actions of Dower*, and the Act passed in the twenty-fourth year of Her Majesty's Reign, intituled: *An Act for the better assignment of Dower in Upper Canada*, are repealed upon, from and after the day this Act shall come into force.

2. All actions of right of dower or of dower *unde nihil habet* shall be brought and carried on according to the provisions of this Act.

Actions of dower governed by this Act.

3. Dower shall not be recoverable out of any separate and distinct lot, tract or parcel of land, which, at the time of the alienation by the husband or at the time of his death, if he died seized

Dower not recoverable out of land in state of nature

(a) Dwaris on Statutes, 530.

(b) Ante, pp. 69, note c. 70, 76, 237, 238, and p. 257.

thereof, was in a state of nature, and unimproved by clearing, fencing or otherwise for the purposes of cultivation or occupation, but this shall not restrict or diminish the right to have woodland assigned to the demandant under the thirty-first section of this Act, from which it shall be lawful for her to take firewood necessary for her own use, and timber for fencing the other portions of land assigned to her of the same lot, tract or parcel.

The latter part of this section considerably enlarges its effect. Under the first part, if any portion of the land had, prior to alienation by the husband or his death, been improved, the widow would not be deprived of whatever right to dower she had under the former law, which gave possibly the right to clear woodland for the purpose of actual cultivation (a). Thus, if three acres out of a lot of ninety-nine acres had been improved, the widow would have been entitled to dower out of the unimproved as well as the improved portion, and all rights of clearing for cultivation the wild portion which might not have been deemed *waste*. The latter part of this section however, apparently by implication restrains the right to clear any of the unimproved portion, even though such clearing, under the old law, might not be deemed *waste*.

4. Every action for dower shall be commenced by writ of summons and shall be addressed to the person in actual possession of the land, out of which dower is claimed and to every other person who is tenant of the freehold of the same land, and in every such writ and in every copy thereof the place and county of the residence and abode of each party defendant shall be mentioned, and the land or property out of which dower is claimed shall be described by the number of the lot or otherwise, with reasonable certainty, and such writ shall be tested as in personal actions, and may be according to the form following :

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To _____ of _____ [naming each defendant and the
place and county of the residence and abode of each defendant.]

We command you (*and each and every one of you*) that you

(a) See ante p. 226, note a.

render to who was the wife of now deceased,
 her reasonable dower which falleth to her of the freehold which
 was of the said her late husband, of and in [*describe
 the land and property by the number of the lot, or the part of the
 lot, concession, name of the township, city, town or place, or
 with such other reasonable certainty as will shew out of what
 land and property dower is claimed*], and whereof she complains
 that you deforce her, or that you appear within sixteen days
 either to disclaim any right or estate of freehold in the said land
 and property, or to defend yourself against her claim.

Witness, &c.

5. Every such writ shall bear date on the day on which it is
 issued, and shall be issued out of the proper office, in the county
 wherein the lands lie, and shall be in force for six months and
 shall be returnable on the sixteenth day after service thereof,
 and shall be endorsed with the name and place of abode of the
 Attorney suing out the same, or (if no Attorney) the name and
 residence of the demandant shall be endorsed thereon in like
 manner, as the endorsements on writs of summons in personal
 actions; and the same proceedings may be had to ascertain
 whether the writ was issued by the authority of the Attorney,
 whose name appears endorsed thereon, and who the demandant is
 and her abode, and as to the staying proceedings upon writs is-
 sued without authority as in personal actions.

6. On every such writ and on each copy thereof shall be en-
 dorsed a notice addressed to the defendants, which may be to the
 effect following :—" You are served with this writ to the intent
 that you may enter an appearance and denial that you are tenant
 of the freehold of the lands mentioned in this writ, or that you
 may enter only an appearance, and take notice that unless within
 sixteen days of the service hereof, you enter an appearance, with
 or without such denial, the demandant will have a right to sign
 judgment to recover as against you the dower claimed with costs
 of suit."

7. In case the demandant claims damages for detention of her
 dower, such notice shall contain a further statement that the de-
 mandant claims damages for the detention of her dower from
 some day to be stated in the notice.

8. Any defendant named in the writ may appear within the
 time appointed and with the appearance, may file a notice ad-
 dressed to the demandant setting out that he denies that he is

Date of writ,
whence issu-
able and when
returnable.

Notice endors-
ed thereon.

Where de-
mandant
claims damag-
es for deten-
tion, &c.

Defendant
may appear
and deny ten-
ancy, &c.

tenant of the freehold of the lands mentioned in the writ, which denial shall as against that individual defendant be taken to admit the claim of the demandant to dower as stated in the writ.

Effect of appearance without denial.

9. Any defendant named in the writ may appear within the time appointed, and, by filing an appearance without such denial, shall be taken to admit that he is tenant of the freehold and shall not afterwards be allowed to deny the same.

Tenant in possession not also tenant of freehold to notify landlord.

10. Every tenant in possession who is not also tenant of the freehold and who is served with a writ under this Act, shall forthwith give notice thereof to his landlord or other person under whom he entered into possession, under the penalty of forfeiting the value of three years' improved rent of the premises in the possession of such tenant, to the person under whom he entered into possession, to be recovered by action of debt to be brought in either of the Superior Courts of Common Law in Ontario.

Penalty.

Landlord may apply to court to be substituted as defendant.

11. The landlord or other person under whom such tenant, as is mentioned in the next preceding section, holds or entered into possession, may, if he has not been served with the writ of dower, apply to the Court or a Judge upon affidavit, that he is tenant of the freehold, and is advised and believes that there is good ground for disputing the demandant's claim to dower, and the Court or Judge may, after summons to or rule upon the demandant, order that such applicant be substituted as defendant in the action, in lieu of the tenant in possession, upon such conditions as shall to the Court or Judge appear just.

If no person in actual occupation, how writ is served.

12. If no person be in actual occupation of the lands of which the demandant claims dower, the writ shall nevertheless be served on the tenant of the freehold, who shall be named therein.

Writ to be served personally except in certain cases.

13. The writ of summons may be served in Ontario, and the service shall be personal whenever that is practicable, but the demandant may, on affidavit, apply from time to time, either to the Court out of which the writ issued or to a Judge of either Court in Chambers, and if it appear to such Court or Judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of defendant, or that he wilfully evaded service of the same, and has not appeared thereto, such Court or Judge may, by rule or order, grant leave to the demandant to proceed as if personal service had been ef-

fect, subject however to such conditions as to the Court or Judge seems fit.

14. In all cases where the tenant of the freehold resides out of Ontario, the demandant may issue a writ of summons in the form above set forth by giving a sufficient number of days, not less in any case than twenty-one for the defendant to appear, according to the distance of the place of the defendant's residence, and having due regard to the means of and reasonable time for postal or other communication; which writ of summons shall bear the same indorsement and notice or notices as the writ of summons hereinbefore set forth, making such changes as the nature of the case renders indispensable.

How writ may be served where tenant resides out of Ontario.

15. Upon the Court or Judge being satisfied that such writ has been personally served upon the defendant, or that reasonable efforts have been made to effect personal service thereof on the defendant, so resident out of Ontario, and that it came to his knowledge, and that he has not appeared, such Court or Judge may from time to time, direct that the demandant may proceed in the action in like manner as if the defendant had been served under this Act in Ontario, subject to such conditions as to such Court or Judge may seem fit, having regard to the time allowed to the defendant to appear, being reasonable, and to the other circumstances of the case.

Proceedings where writ served or reasonable efforts to serve defendant have failed, &c.

16. Any defendant named in the writ, may within the time appointed, file an appearance and acknowledgement that he is tenant of the freehold of the land named in the writ, together with his consent that the demandant may have judgment for her dower therein, and may take the proceedings authorized by this Act to have the same assigned to her, unless the parties shall otherwise agree, and he shall forthwith serve the demandant or her Attorney with a copy of such appearance, acknowledgement and consent, together with an affidavit of the day of the entering and filing the same in the proper office, and in every such case when the defendant so admits the right to recover, the demandant may enter judgment of seizin forthwith, and may obtain a writ of assignment of dower in manner hereinafter specified, but she shall not be entitled to tax or recover the costs of suit or entering such judgment against the defendant.

Defendant may file appearance and acknowledge tenancy.

Judgment of seizin and writ of assignment thereon.

17. In case an appearance be entered with a denial by the defendant that he is tenant of the freehold, the demandant may at

Proceedings when appear-

ance and denial filed. once and without further pleadings take issue on that denial and make up an issue book, setting out the writ, the appearance and denial and the issue thereon, and may give notice of trial and proceed to trial as in personal actions, and if she obtains a verdict she shall be entitled to costs and to enter judgment of seizin of her dower, as against such defendant.

Proceedings if only appearance entered. 18. In case only an appearance be entered, the demandant may at once declare, and when damages are claimed in the writ, they may also be claimed in the declaration which may be to the effect following :

In the *(the style of the Court)*
County of } The day of 18
to wit : }

Form of declaration. A. B., widow, (*as the case may be*) who was the wife of C. B. deceased, by her Attorney, demands against (*the defendant*) the third part of (*the land and premises as described in the writ*) with the appurtenances in the (*township, &c.,*) of in the said county of as the dower of the said A. B. of the endowment of C. B., deceased, heretofore her husband, whereof she has nothing (*and if damages are claimed*) and she also claims damages for the detention from her of her endowment in the said lands from the day of 18 and she claims \$

To what extent C. L. P. Act shall apply. 19. The several enactments, in the Common Law Procedure Act relative to pleas, demurrers, replications and subsequent pleadings, and the periods appointed within which the same must be pleaded, and in which notice of trial must be given and countermanded, and as to amending pleadings, and as to practice not herein provided for, and making all or any other amendments, and as to the authority of the Court or of a Judge in such matters, and also the rules of Court, from time to time in force relative to pleading and practice, shall, so far as they can be made applicable, and are not at variance with this Act, be in force and apply to and regulate the course and practice of pleading and procedure in actions of dower.

Special cases. 20. Special cases may be stated by leave of the Court, or a Judge in like manner as in other actions.

Mode of estimating damages for dower. 21. In estimating damages for the detention of dower or the yearly value of the lands, for the purpose of fixing a yearly sum of money in lieu of an assignment of dower by metes and bounds

the value of permanent improvements made after the alienation of the lands by the husband or after the death of the husband shall not be taken into account, but such damages or yearly value shall be estimated upon the state of the property at the time of such alienation or death, allowing for the general rise, if any, in the price and value of land in the particular locality.

Some difficulty may arise on this section when the right to dower became consummated by the death of the husband before 18th May, 1861 (24 Vic. ch. 40), in which case sections 26 to 40 both inclusive, which provide for the writ of assignment of dower after judgment, and (s. 31) for fixing a yearly value in lieu of assignment by metes and bounds, do not apply (see s. 42). The Act of 24 Vic. which as to an annuity in lieu of dower has provisions somewhat analogous to the late Act, did not apply as respects such provisions when the husband died before 18th May, 1861, and is moreover repealed. The 24th section of the late Act provides that *pending* actions may be carried on to *judgment* as if it had not been passed. Section 43 enacts that in cases not otherwise provided for, the pleadings and proceedings shall be regulated as they were before 10th August, 1850 (13 & 14 Vic. ch. 58, Con. St. ch. 28). The question may arise therefore how far where the husband died before 18th May, 1861, there is power to assign an annuity in lieu of dower, and how far the old law is to govern in cases where improvements have been made after alienation by the husband or after his death (a).

Somewhat the same question arises when the husband died after 18th May, 1861, and the execution issued before this Act. Except so far as regards the question above referred to of power to assign an annuity in lieu of dower, this section would seem to be unlimited and retrospective.

In the case of *Doe Riddell v. Gwinnell* (1 Q. B. 682), all the authorities on the subject of the widow being allowed

(a) See also remarks under section 24, and as to the old law, dower and damages in regard to improvements, see *Park on Dower*, 256, 301; *Harg. Co. Litt.* 32 a, note 8; *Norton v. Smith*, 20 Q. B. U. C. 213; *Buck v. McCallum*, 13 C. P. U. C. 163; *Robinet v. Lewis*, *Draper's Rep.* 272; *Bishoprick et ux v. Pearce*, 12 Q. B. U. C. 306.

dower out of improvements were considered, and that case appears to conflict as to the old law with the authorities in our courts. It was there held that the widow was entitled to a third in value, estimating the value as it was at the time of the assignment, though they had been improved in value after the conveyance by the husband by buildings erected thereon. And that though since the conveyance by the husband, the lands had passed into the hands of various persons, and one third at least had not been built on, she was entitled to dower out of the lands in possession of each person.

Time for
bringing ac-
tion.

22. No action of dower shall be brought but within twenty years from the death of the husband of the demandant.

This section was before treated of (a).

Cases where
action not to
be maintain-
ed.

23. No such action shall be hereafter maintained, in case the demandant has joined in a deed to convey the land or to release her dower therein to a purchaser for value, although the acknowledgment required by law at the time may not have been made or taken, or though any informality may have occurred or happened in the making, taking or certifying such acknowledgment.

This section was before treated of (b).

Pending ac-
tions may be
continued.

24. All actions of dower which shall be pending at the time this Act shall come into force, may be continued and carried on to judgment in like manner as if this Act had not been passed.

It must be borne in mind that this section is limited to proceedings before judgment. After judgment this Act will apply, except where the husband died before 18th May, 1861, when sections 26 to 40 will not apply (s. 42). In such latter case the proceedings on the execution must apparently conform to the old law as it existed before 24 Vic. ch. 40 (as that Act by its sixteenth section will not apply and is moreover repeated) except so far as such old law may be controlled by sections 3 and 21 of this Act (c). It may be also that sections 26 to 40 will not apply where the writ of execution has issued before the Act.

(a) Ante p. 236.

(b) Ante p. 238.

(c) See also observations as to section 21.

25. Unless where it is in this Act expressly declared to the contrary, costs shall be taxed and allowed to, and be recoverable by either party, in an action of dower, in like manner as in personal actions, and writs of execution to levy the same, with damages, where damages have been adjudged, may be sued out and executed as in personal actions. When costs recoverable.

26. After judgment has been rendered in the demandant's favour to recover dower, whether with or without costs or damages, she shall be entitled to sue out a writ of assignment of dower, founded upon such judgment, directed to the sheriff of the County in which the lands lie, in which writ shall be set forth the lands out of which the demandant has recovered judgment to recover her dower. Effect of judgment for demandant.

27. The Sheriff, on receipt of such writ, shall by writing under his seal of office, appoint two resident freeholders of his County who are rated on the assessment roll for real estate of a value not less than two thousand dollars each, and a licensed deputy provincial surveyor, and each of whom would in other respects be eligible to serve as a juror between the parties named in the said writ, to be Commissioners to admeasure the dower, and the Sheriff shall in such writing set out a copy of the writ of assignment, and shall name therein a day on or before which the Commissioners shall make and return to him a report of their proceedings, and determination in the execution of the duty assigned to them. Sheriff to appoint Commissioners to admeasure the dower, &c.

28. In case of the death of, or refusal by, any or all of the Commissioners so appointed, the sheriff shall, from time to time, in like manner, appoint another or others to perform the duty of such as die or refuse. Provision in case of death, &c., of Commissioners.

29. Every Commissioner so appointed shall, before entering upon the execution of his duty, take and subscribe an affidavit in the form or to the effect following, which oath any person duly authorized and appointed to take affidavits in the Superior Courts of Common Law, is hereby empowered to administer, and the said Commissioners shall annex to their report the affidavits sworn by them, and return them to the sheriff. Oath of Commissioners.

" I , do swear that I am not of kin to the demandant (*naming her*) nor to the defendants (*naming him or them*) nor in any way interested in the lands out of which the assignment of dower is to be made by me, and that I will honestly,

impartially, and to the best of my skill and ability, execute and perform the duties imposed upon me by the appointment of Esquire, Sheriff of the county of _____, as a Commissioner for the admeasurement of dower between the said demandant and the said defendants according to law."

Commissioners when sworn to be officers of the Court.

30. After taking and subscribing such affidavit, the Commissioners and each of them shall, for all purposes in the fulfilment of the duties by law required of them, be considered as officers of the Court out of which the writ of assignment is issued, and shall be entitled to the same immunities and protection and be subject to the same liabilities and proceeding as a Sheriff, in the discharge of his duty.

Their duties.

31. It shall be the duty of the Commissioners—

To admeasure dower by bounds &c. ;

1. To admeasure, designate and lay off without delay, by sufficient marks, descriptions, boundaries or monuments, one-third of the lands and premises mentioned in the writ of assignment, according to the nature of the land, whether meadow, arable, pasture or woodland, being a part of the lot or parcel of land and premises mentioned in the writ, and having always due regard to the nature and character of the buildings and erections on such lands and premises ;

to ascertain improvements, &c. ;

2. To ascertain and determine what permanent improvements have been made upon such lands and premises, since the death of the demandant's husband or since the time her said husband alienated the same to a purchaser for value, and if it can be done they shall award the dower out of such part of the lands, as do not embrace or contain such permanent improvements, but if that cannot be done they shall deduct either in quantity or value from the portion to be by them allotted or assigned to the demandant in proportion to the benefit she may or will derive from the assignment to her as part of her dower of any part of such permanent improvements ;

and where Commissioners cannot assign bounds, &c., to assess a yearly sum.

3. If, from peculiar circumstances, such as there being a mill or mills, or manufactory, upon the land, the Commissioners cannot make a fair and just assignment of dower by metes and bounds, they shall assess a yearly sum of money being as near as may be one-third of the clear yearly rents of the premises, after deducting any rates or assessments payable thereon, and in assess-

ing such yearly sum they shall make allowances and deductions for permanent improvements, as above provided for, and in their report to the Sheriff, they shall state the amount of such yearly sum and set forth all the evidence taken by them in relation to the same, such evidence to be reduced to writing and taken upon oath (which any one of the Commissioners is hereby authorized to administer), and to be subscribed by the witness examined ;

Evidence to be on oath.

4. Such yearly sum shall be a lien upon the lands mentioned in the writ of assignment, unless the Commissioners specially direct otherwise and make the same issuable and payable out of some specific portion of such lands, and the same shall be recoverable by distress as for rent or by action of debt against the tenant of the freehold for the time being ;

Such sum to be alien on lands, unless otherwise directed.

5. The report of the Commissioners shall be in writing, subscribed by them and directed to the Sheriff and shall contain a full statement of their proceedings, and, where the dower is assigned by metes and bounds, shall distinctly point out and describe the same and the posts, stones or other monuments designating the boundaries, and, for the purpose of planting and marking such posts, stones or monuments, they may, if necessary, employ chain-bearers and labourers.

Report of Commissioners.

32. The Sheriff may in his discretion upon the request of the Commissioners, enlarge the time for making their report, for not more than ten days, and he shall, within twenty-four hours after the receipt thereof, endorse thereon the day and hour of such receipt, and he shall then forthwith return the writ of admeasurement of dower, together with the report and all papers annexed thereto, to the office wherein the suit was commenced and carried on, and the Deputy Clerk of the Crown, into whose office such writ and other papers have been returned, shall, on the application of either party, transmit the same to the proper principal office in Toronto, in like manner, and on the same conditions as he is required to transmit any record of *Nisi Prius* and subject to the same liabilities, in case of his default.

Sheriff may enlarge time for report.

Report to be returned to Deputy Clerk of Crown.

33. Either party may, after the expiration of ten days from the filing of the Sheriff's return to the writ of assignment, provided such ten days have elapsed before the first day of the term next after such filing, and if not, then within the first four days of the succeeding term, apply for, and the Court may grant a

Either party may apply to set aside report.

rule calling upon, the the opposite party to shew cause why the Commissioners' report should not be set aside upon grounds apparent on the report and papers filed therewith and upon such other grounds, as the Court may see fit, the same being supported by affidavit and every such ground being set forth in the rule; and the Court after hearing the parties may order the report to be varied or amended, if in their judgment they have sufficient matter before them to amend by, or may annul and set aside the report and may appoint three new Commissioners or direct that the Sheriff shall do so, and such new Commissioners shall have the same powers and execute the same duties and be subject to the same conditions and responsibilities as are in that behalf hereinbefore expressed, and the report of such new Commissioners shall be treated as if no other report had been previously made and shall be dealt with and proceeded upon accordingly.

Order of Court thereon.

Effect of report being moved against for misconduct, &c.

34. If the report is moved against upon the ground of any misconduct or fraud on the part of the Commissioners, the Court may, in its discretion, make them parties to the rule, and if wilful misconduct or fraud be established in the opinion of the Court, the report may be set aside and the Commissioners be adjudged to pay to the parties injured all the costs which have been incurred and have been rendered useless by such misconduct or fraud, and all the costs of the rule to set aside the report, and such payment may be enforced by the like process and proceedings as are or may be in use to compel a Sheriff to pay costs of any rule or summary proceeding against him.

Costs of rule.

35. The rule to set aside the report may be discharged, with or without costs, and the Court may order the party at whose instance, or on whose complaint or representation, the Commissioners may have been made parties to the rule, to pay such Commissioners their costs of answering the same, and if the rule be discharged, or if the report be not moved against within the proper time, or if the Court refuse to grant a rule to shew cause, the report shall thenceforth be final and conclusive on all parties to the dower action, and a copy of such report certified by the Clerk of the Crown, under the seal of the Court, shall be registered in the Registry office of the County or place where the lands lie, for which service the Registrar shall be entitled to receive one dollar.

Copy of report when final to be registered.

Demandant

36. After such registration the demandant shall be entitled to

sue out a writ directed to the proper Sheriff, commanding him to put her into possession of the lands and premises assigned and admeasured to her for her dower, and to levy all such costs as by the judgment and any rule of Court, or either, shall have been awarded to her against the tenant.

37. In case judgment shall have been given against the demandant and costs be awarded to be paid by her to the defendant by such judgment, or by any rule of Court, such defendant may issue a writ of *feri facias* to recover the same.

If judgment against demandant defendant may issue *fi. fa.*

38. In case it is desired by either party to produce any witnesses before the Commissioners, such party may, on application to the Court out of which the writ of assignment issued, or to any Judge of either of the Superior Courts of Common Law, on affidavit that the evidence of any such witness is necessary, obtain an order commanding the attendance of any such witness before the said Commissioners, and, if in addition to the service of such order, an appointment of time and place of attendance in obedience thereto, signed by one of the Commissioners, be served on the person whose evidence is required either with or after the service of the order, non-attendance shall be deemed a contempt of Court, and shall be punishable accordingly, but the person required to attend, shall be entitled to be paid the the same fees, allowance and conduct money as if he had been subpoenaed as a witness in an ordinary suit, and no witness shall be obliged to attend more than two consecutive days.

Mode of procuring attendance of witnesses before Commissioners.

39. The Commissioners shall be entitled to receive from the demandant the sum of four dollars for each day's attendance, not, however, to exceed two, and may also charge at the rate of twenty cents for every hundred words for drawing up their report, and ten cents for every hundred words of each copy furnished by them to either party.

Commissioners' fees.

40. The demandant shall pay the cost of suing out and the cost of the Commissioners in executing the writ of assignment of dower, and making the report thereof, but each party shall pay their own costs of witnesses, or of attorney, or counsel, attending before the said Commissioners.

By whom costs to be paid.

41. The demandant and the tenant of the freehold may, by any instrument under their respective hands and seals, executed in the presence of two credible witnesses, agree upon the assignment of

Demandant and tenant may agree

upon assignment, &c.

dower, or upon a yearly sum, or a gross sum to be paid in lieu and satisfaction of dower, and a duplicate of such instrument proved by the oath of one of the subscribing witnesses, which oath any Commissioner duly appointed for taking affidavit may administer, shall be registered in the Registry office of the county where the lands lie, and shall entitle the demandant to hold the land so assigned to her, against the assignor and all parties claiming through or under him, as tenant for her life, or to distrain for, or to sue for, and recover in any Court having jurisdiction to the amount, the annual or other sum agreed to be paid to her by such tenant of the freehold, and such instrument so registered shall be a lien upon the land for such yearly or other sum, and shall be a bar to any other action, suit or proceeding by the demandant for dower in the lands mentioned therein.

Sections 26 to 40 not to affect certain cases.

42. The several clauses of this Act, numbered from twenty-six to forty, both inclusive, shall not apply to or affect cases in which the right to dower became consummate by the death of the husband, before the Eighteenth day of May, which was in the year of our Lord one thousand eight hundred and sixty-one. (a).

Mode of proceeding where not prescribed.

43. In all cases not otherwise provided for by this Act the pleadings and proceedings shall be regulated by the law as it was in force in Upper Canada, relative to suits and actions of dower, before the tenth day of August, which was in the year of our Lord one thousand eight hundred and fifty (b).

Short title.

44. This Act may be cited as *The Dower Act of Ontario*, and shall take effect upon, and from and after the first day of February next.

(a) See observations under ss. 21, 24.

(b) See observations under ss. 21, 24.

CON. STAT. CH. 85.

An Act respecting the Conveyance of Real Estate by Married Women.

Prior to the Act of 43 Geo. 3. ch. 5, the only mode by which a married woman could convey her estate or any interest therein was by fine or recovery, except as to leases under the St. 32. H. 8, ch. 28, hereafter referred to. That statute of 43 Geo. 3, recited that no express provision had been made for levying fines in the Province, but there can be no doubt that fines and recoveries were introduced with other real actions and forms of procedure by the 32 Geo. 3, ch. 1 : they were abolished with other real actions, except on dower, by 4 Wm. 4, ch. 1 ; Con. St. ch. 27, s. 78.

At com. law conveyance by married women was by fine or recovery.

The various enabling statutes all required an examination of the married woman by analogy to the examination required on levying a fine, but as regards the certificate of such examination, they would appear to be merely directory till the Act of 1 Wm. 4, ch. 2, under which the deed was expressly declared not to be valid unless the certificate were endorsed ; and the next Act of 2 Vic. ch. 6, first made the certificate *prima facie* evidence of the facts therein stated.

The early statutes prior to 1 W. 4. c. 2 merely directory as to certificate.

Act of 2 Vic. first made certificate evidence.

SECTION 1.

1. Any married woman seized of or entitled to Real Estate in Upper Canada, and being of the age of twenty-one years, may, subject to the provisions hereinafter contained, convey the same, by deed to be executed by her jointly with her husband, to such use and uses as to her and her husband may seem meet. 59 G 3, c. 3, s. 1. ; 2 G. 4, c. 14.

Married woman of full age may convey.

What interests in real estate are capable of being conveyed under this Act, whether where the realty is directed to be converted into personalty, or where the interest is a

What interests in real estate can be conveyed.

Cases as to
joint execu-
tion, exami-
nation, &c.

mere charge, or is a reversionary chose in action, and otherwise, is considered in treating of Con. St. ch. 73 (a).

Where a conveyance by husband and wife was executed by each in a different place but so far as appeared on the same day, and it was duly certified by two Justices as required by this Act, this was held to be a joint execution within the Act; and Draper, C. J., said that he did not understand that the deed must necessarily be executed in presence of the husband (b). A conveyance was dated the 20th October, 1834, and the certificate shewed it to have been executed, or at least acknowledged as executed by the wife, on 17th November, 1834, it was held that even if the deed were open to an objection that the examination was after the execution, that such defect was cured by 22 Vic. ch. 35, s. 2 (s. 11 of this Act); and as regarded the joint execution, the Court recognized the case above referred to, and held also that the production from the proper custody of the deed 30 years old proved a joint execution according to the purport of the deed (c). If the husband be not named as a party to the deed, then though he execute, and be referred to in the deed as husband of the wife it will not suffice (d).

Must certifi-
cate be given
on day of
joint execu-
tion by hus-
band and wife?

The certificate is required by ss. 2 & 3, to be on the day of execution of the deed, and if this means the day of joint execution by both husband and wife, then apparently both must execute on the same day: if however the day of execution is to be referred to the day of execution by the wife, there is still no decided case expressly shewing that execution by the husband on a day prior or subsequent to that of execution by the wife would suffice. The preamble of the Stat. 2 Vic. ch. 6, bears on the question. It is to be observed that section 4 does not enjoin certifying on the day of execution. Whatever may be the law on the sub-

(a) Post p. 275. (b) Burns v. McAdam, 24, Q. B. U. C. 449.

(c) Monk v. Farlinger, 17 C. P. U. C. 41.

(d) Doe d. Bradt v. Hodgins, 2 Q. B. U. C. O. S, 213; Foster v. Ball, 15 Grant, 244; but these cases would not be conclusive against a deed executed under a power of attorney from the wife to which the husband was a party pursuant to 29 Vic. c. 28, s. 22.

ject, the parties will not be precluded by the date of the deed from shewing that in truth it was executed by both husband and wife, or either, on a day differing from the date: and possibly where the date of the deed and the certificate vary, still if the certificate states in the body thereof that the conveyance was executed on the day of the examination and certificate, it would, since 2 Vic. ch. 6, be sufficient *prima facie* evidence that the deed was executed by the woman on that day so as to rebut the presumption of execution by her on the day of the date of the deed; still however the presumption would continue as to the husband, and the question of joint execution would remain.

Considering the cases before referred to it may be where a conveyance is executed by a husband and dated of the day of such execution, and the wife executes and is examined and the certificate given on a subsequent day that it will suffice.

The question of joint execution of the deed of conveyance is somewhat affected by 29 Vic. ch. 28, s. 22, authorizing execution by the wife under a power of attorney, the language of which would imply that where the husband is a party to and executes the power, he need not be a party to or execute the conveyance, and that if he execute the latter he need not execute the former. The section is as follows:

A power of attorney executed by a married woman for the sale or conveyance of any real estate of or to which she is seized or entitled in Upper Canada, or authorizing the attorney to execute a deed barring or releasing her dower in any lands or hereditaments in Upper Canada, shall be valid both at law and in equity; provided, (1) that she be examined and a certificate indorsed on the power of attorney, as required in regard to deeds and conveyances by a married woman, under the Consolidated Statutes for Upper Canada respectively, intituled: *An Act respecting Dower*, and *An Act respecting the conveyance of Real Estate by Married Women*: and provided (2) that her husband is a party to and executes such power of attorney or the deed or other instrument executed in pursuance thereof, where the power is for the sale or conveyance of her real estate.

It would seem that the second proviso relates only to the case of conveyance of real estate, and if so, then the act is silent as to execution by the husband in case of release of dower by the wife by deed poll to which he is no party. In such case, irrespective of this section, examination and certificate thereof endorsed on the instrument is requisite (a): and it is not perhaps quite clear that such a case is contemplated or taken in by the act, and whether it does not relate solely to her "joining with her husband in a deed or conveyance in which a release of dower is contained," (b), as named in Con. Stat. ch. 84, s. 4, in which case the act gives authority which did not before exist. As regards conveyance of real estate the act implies that if the husband execute the deed he need not execute the power and *vice versa*.

It is by no means clear that section 5 of the Con. Stat., making the certificate *prima facie* evidence of the facts therein stated would apply to a power under this section.

It may be proper where a power to convey is given under this section to add in the certificate before the words "without coercion, &c.," the words, "and to give and execute the within deed."

The judges in Chancery have no power to examine.

The Judges of the Court of Chancery have no power to take an examination under the act.

SECTION 2.

How to convey in Upper Canada.

2. In case such married woman executes such deed in Upper Canada, she shall execute the same in the presence of a Judge of one of the Courts of Queen's Bench or Common Pleas, or of a Judge of the County Court, or of two Justices of the Peace for the County in which such married woman resides or happens to be when the deed is executed, and such Judge or two Justices of the Peace (*as the case may be*) shall examine such married woman apart from her husband respecting her free and voluntary consent to convey her Real Estate in manner and for the purposes expressed in the deed, and if she gives her consent, such Judge or Justices shall, on the day of the execution of such

(a) See ante 237.

(b) See *Miller v. Wiley*, 17 G. P. U. C. 371, per A. Wilson, J.

deed, certify on the back thereof to the following effect : 59 G. 3, c. 3, ss. 2, 3,—1 W. 4, c. 2, s. 1,—2 V. c. 6, s. 1,—14, 15, V. c. 115.

" I, (or we, *inserting the name or names, &c.*) do hereby certify that on this day of at the within deed was duly executed in my (or our) presence by A. B., of , wife of , one of the grantors therein named, and that the said wife of the said , at the said time and place being examined by me (or us) apart from her husband, did appear to give her consent to convey her estate in the lands mentioned in the said deed freely and voluntarily and without coercion or fear of coercion on the part of her husband or of any other person or persons whatsoever.

SECTION 3.

3. In case any such married woman resides in Great Britain How in Great Britain or Ireland, or in any Colony belonging to the Crown of Great Britain other than Upper Canada, and there executes any such deed, she shall execute the same in the presence of the Mayor or Chief Magistrate of a City, Borough or Town corporate in Great Britain or Ireland, or of the Chief Justice or a Judge of the Supreme Court of such Colony ; and such Mayor or Chief Magistrate, Chief Justice or Judge (as the case may be) shall examine such married woman, apart from her husband, touching her consent in manner and form and to the effect specified in the second section of this Act, and if she thereupon gives such consent, such Mayor or Chief Magistrate, under his hand and the seal of the City. Town or Borough, or such Chief Justice or Judge under his hand, shall, on the day of the execution of such deed, certify on the back thereof to the effect hereinbefore mentioned in the said second section. 59 G. 3, c. 3, ss. 2, 5—1 W. 4, c. 2, s. 1,—2 V. c. 6,—14, 15 V. c. 115.

SECTION 4.

4. In case any such married woman resides either temporarily How in foreign or permanently in any State or Country not owing allegiance to any state. the Crown of Great Britain, and there executes any such deed, she shall execute the same in the presence of the Governor or other Chief Executive Officer of such State or Country, or in the presence of the British Consul resident in such State or

Country, or in the presence of a Judge of a Court of Record of such State or Country, and such Governor, Chief Executive Officer, Consul or Judge (*as the case may be*) shall examine such married woman apart from her husband, touching her consent in manner and form and to the effect specified in the second section of this Act; and if she thereupon gives such consent, such Governor or Chief Executive Officer, under his Hand and the Seal of such State or Country, or such Consul under his Hand, or such Judge under his Hand and the Seal of his Court, shall certify to the effect hereinbefore mentioned in the said second section. 59 G. 3, c. 3, s. 2,—1 W. 4, c. 2, s. 1,—2 V. c. 6,—14, 15 V. c. 115.

In considering the cases attention must be given to the particular statute which governs, as the statutes sometimes vary in language.

Cases.

The Statute 1 Wm. 4, ch. 2, did not require that the place of execution should be mentioned in the certificate, but merely the place of appearance before the Justices for examination; and this place is sufficiently indicated by the marginal venue in the certificate, as, for instance, "Province of Upper Canada, Eastern District, to wit;" and the words "then and there" refer to the margin. It appeared from the deed, in this case, that it was dated 20th of October, 1834, and from the certificate that it was acknowledged 17th of November following; it was held, on objection that the examination did not take place on the day of the execution of the deed, as required by the above act, that this defect, if it really existed, was cured by 22 Vic. ch. 35, sec. 2; also that the act did not require the deed to be executed by husband and wife jointly in the presence of the justices, but only that it should be executed by her jointly with her husband, and that she should execute it in their presence. In this case, governed by the Act of 1 Wm. 4, ch. 2, the words of the certificate were: "Being separately and duly examined by us, consented thereto, and it appears to us that such consent was free and voluntary, and not the effect of coercion, or the fear of coercion on the part of her husband,

or any other person:" this was held to be synonymous with, "being examined apart from her husband, did appear to give her consent to depart with her estate, freely and voluntarily, and without any coercion on the part of her husband." Also, that the certificate as remedied by section 11 of this act, containing in substance all that the statute under which it was given required, was evidence of the fact of examination, &c., in accordance with *Jackson v. Robertson*, 4 C. P. U. C. p. 272.

Defendant produced a deed, upwards of thirty-one years old, with such certificate thereon, from plaintiff and her husband to the devisor of defendant's wife, and it was admitted that defendant and those under whom he claimed had been in possession during all this period; it was held, following *Orser v. Vernon* that the deed with the certificate upon it, coming from the proper custody, proved itself; and that from the fact that the possession of the land had gone in accordance with it for more than thirty-one years, it would be presumed that the deed as produced had been properly executed, and that everything done by the Justices as public officers, had been rightly done until the contrary was shewn (a).

Where the certificate signed by two Justices of the Peace omitted to state in the body thereof any place where the execution of the deed, dated in 1857, or the examination of the married woman took place, but in the margin, the county was given as the place wherein the Justices were authorized to act, it was held that it sufficiently complied with the statute (b).

Where the certificate endorsed on a deed, executed in one of the United States in 1859, was given by a person described as a Judge of the District Court in that State, and under the seal of the court, but it was not stated in the certificate (which would have been enough),

(a) *Monk v. Farlinger*, 17 C. P. U. C. 41; see also *Orser v. Vernon*, 14 C. P. U. C. 573.

(b) *Robinson v. Byers*, 13 Grant 388; *Simpson v. Hartman*, 27 Q. B. U. C. 460; see also *Monk v. Farlinger*, *supra*.

or otherwise proved, that such Court was a Court of Record it was held, insufficient, (a).

Where the question was whether a deed by a married woman had been executed with the requisite formalities, and some evidence was given to show that it had been acknowledged before a Judge of a Superior Court here, it was held that the jury were rightly directed, if they should find that the deed had been so acknowledged, to presume that it was done within the proper time (b).

The certificate endorsed on a deed bearing date 18th May, 1856, was that at the Court of general Quarter Sessions, holden at, &c., "on Tuesday, the 16th day of May, 1856, personally appeared the within named S E, wife of the within named D E, and being duly examined, &c.," in the usual form, it was held sufficient, for it should be assumed that the 16th was the first day of the sessions, which might have been continued, and the certificate signed after the execution of the deed. *Semble*, per McLean, J., that defects in such certificate, or even the omission of it altogether, would not invalidate the deed if it were proved that the acknowledgment was in fact duly taken (c).

A certificate under the 2 Geo. 4., ch. 14, signed by the chairman, and countersigned by the clerk of the peace, and endorsed on a deed, that on, &c., personally appeared C B. within named, and being personally examined in the presence of, &c., justices of the peace, &c., touching her consent thereto, and did appear to this Court to give the same freely and voluntarily, without any coercion on the part of her husband or any other person. Held, that such certificate, though deficient in form, was good in substance (d).

A certificate which did not state that the woman was examined "apart from her husband," and no proof of that fact being given on the trial, was held insufficient (e).

(a) *McCammon v. Blaüpre* 25 Q. B. U. C. 419.

(b) *Tiffany v. McCumber*, 13 Q. B. U. C. 159.

(c) *Allison v. Rednor*, 14 Q. B. U. C. 459.

(d) *Jackson v. Robertson*, 4 C. P. U. C. 272.

(e) *Stayner v. Applegate*, 8 C. P. U. C. 133.

A conveyance of land in the Eastern District, by a married woman, executed on the 8th October, 1821, had endorsed upon it this certificate: "Personally appeared this day, in open session, the within named E B, wife of J B, who being duly examined touching her consent to alien and depart with her lands within mentioned, declared that she freely and voluntarily, &c. Given under my hand, in open Court, this 10th October, 1821. (Signed), Joseph Anderson, Chairman." It was proved that Joseph Anderson was chairman of the Sessions, being usually chosen so, though not the Judge of the District Court. The defendant objected that the certificate did not state that she appeared and was examined in open Court, nor that it appeared to the Court that she freely, &c., nor that the Court was held in and for the Eastern District; nor did it appear that she was then over the age of twenty-one; it was held, (the execution of the deed being proved by its age), having regard to the intention of the Legislature to do away with the effect of informalities, (C. S. U. C. ch. 85, s. 13), that the certificate with the evidence was sufficient (a).

The certificate on a married woman's deed, twenty-five years old, signed by two justices, was as follows:

MIDLAND DISTRICT, { "Be it remembered, that on the 8th
To Wit: { May, 1845, R G, wife of the within
named L G, who being examined by us, separate and
apart from her said husband, touching her consent to
surrender and give up to the within named H L, his heirs
and assigns, all her right and title," &c., &c.; it was held
sufficient—for, 1. It was immaterial that the certificate was
not endorsed on the deed, but written in the margin on the
face of it. 2. The venue sufficiently shewed where the
examination took place: and an admission which was made
of the Justices' authority, must be taken to mean their
authority as Justices for that district. 3. As the names of
the two witnesses to the deed were the same as those of the

(a) *Morgan v. Sabourin*, 27 Q. B. U. C. 230.

Justices, and the handwriting similar, and the date of the deed and certificate the same, it might be inferred that the execution took place in their presence. 4. The words "surrender and yield up" were equivalent to the statutory phrase "depart with." The motion being for a non-suit, as there was thus evidence from which a jury might have found the requirements of the Acts complied with, the rule was discharged (a).

Certificate to be evidence *prima facie*.

5. Every certificate given under this Act, shall be *prima facie* evidence of the facts therein stated. 14, 15 V. c. 115, s. 2.

Sec. 5 should refer also to 2 Vic. c. 6 s. 2, prior to which certificates were not evidence.

This section should refer also to 2 Vic. ch. 6, s. 2, under which also the certificate is *prima facie* evidence. The earlier Acts have no such provision as to certificates granted under them. The cases bearing on this section are before referred to.

The officer certifying need not attest as a witness.

6. It shall not be necessary for any Judge or other Officer who may certify in any of the foregoing cases, to attest as a subscribing witness, the execution of any Deed upon the back of which he may so certify. 14, 15 V. c. 115, s. 1.

If not duly executed, the deed shall not be valid.

7. If any such Deed of any such married woman be not executed, acknowledged and certified as aforesaid, the same shall not be valid or have any effect. 14, 15 V. c. 115, s. 2—1 W. 4, c. 2 s. 1,—59 G. 3, c. 3, s. 5.

In the statute as printed, reference is also made to 59 Geo. 3, ch. 3, s. 5, which is a mistake, as that act has no such clause, and the error is not unimportant (b).

How far conveyance by husband and wife, invalid as to the wife is valid to pass husband's interest.

It is quite clear that before the Statute of Wm. a joint conveyance by husband and wife of her estate, and of the interest of the husband, invalid for non-compliance with the formalities as to examination, &c., enjoined by the statutes, is void also to pass any interest of the husband (c). The

(a) *Simpson v. Hartman*, 27 Q. B. U. C. 460.

(b) See, per McLean, J., *Allison v. Rednor*, 14 Q. B. U. C. 459.

(c) *Doe d. Dibble v. Ten Eyck*, 7 Q. B. U. C. 600; *Allan v. Levesconte*, 15 Q. B. U. C. 9; but see per *Eaten*, V. C., *Gillespie v. Groves*, 3 Grant. 589.

acts of 43 Geo. 3, ch. 5, and 59 Geo. 3, ch. 3, expressly enacted that "nothing in such deed contained shall have any force or effect to bar such married woman, or *her said husband*, or her heirs, unless," &c. The language in the subsequent statutes is different; it is, "such deed shall not be valid or have any effect unless," &c.; and it has been said (*a*), that this may make a difference, and that under those statutes the interest of the husband may pass as at common law, though the deed is void as against the wife and her heirs; but this again has been denied (*b*), and in this conflict of views the author does not presume to give any opinion. It is to be remarked however, that the statutes are enabling statutes, and to empower the estate of a married woman to be conveyed, there was no necessity to empower the husband to convey his interest; and it may be argued that where these enabling acts declare that the "deed shall not be valid or have any force or effect whatever," this means *quoad* only the interest as to which they were enacting and authorizing to be conveyed. Something perhaps might be urged by reason of the change of language in the later acts, and the omission of the name of the husband.

A recent case in England bears on the question. A lease was made by husband and wife for seven years of lands of the wife, in April, 1860, containing a covenant by the lessee and defendants as his sureties to pay rent during the term. The wife did not acknowledge under 19 & 20 Vic. ch. 120, s. 32, which gives power to married women to dispose of her estate in lands, "save and accept that no such disposition—shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed." The lessee entered, and occupied till August,

(*a*) See per Blake, C., *Wallis v. Burton*, 5 Grant, 354; and per Richards, C. J., in *Doran v. Reid*, 13 C. P. U. C. 400; also the views of Esten, V. C., in *Gillespie v. Grover*, *supra*, and *Moffatt v. Grover*, 4 C. P. U. C. 402; and *Beattie v. Mutton*, 14 Grant, 688, per Spragge, V. C.

(*b*) *Farquharson v. Morrow*, 12 C. P. U. C. 313, per Draper, C. J.; *Allan v. Levesconte*, 15 Q. B. U. C. 9.

1866. The husband died in January, 1866, and the wife in January, 1867. The executors of the wife sued on the covenant to recover rent accrued due in June, 1866. It was contended that no action could be brought on the covenant, as the lease was void as against the wife, and the term stipulated for was never created, and *Swatman v. Amber*, 8 Ex. 72 (a), was relied on. The Court referred to the fact that there was nothing to shew that it was contemplated the deed should be acknowledged so as to make it conclusively binding on the wife and her heirs in case she survived, nor but that the lessee and the defendants were willing to take a lease executed by husband and wife at common law. At common law of course the lease would be good against the husband during coverture. It was held that the covenant bound the defendants, as the lessors had executed the deed, so as to pass the term for which the lessee and the defendants were to be taken as having contracted for, viz., a term for seven years, terminable at the option of the wife on death of the husband during the term; and that as the wife had done nothing to avoid the lease but allowed the lessee to retain possession, the lease was subsisting up to her death, and the plaintiffs could recover (b).

Where the conveyance is void merely because the wife is a minor.

It has been suggested also that whatever may be the case as to passing the interest of the husband, where the conveyance by him and his wife is not in accordance with the formalities of the act as to examination, &c., that there may be a distinction where the deed is void as to the wife by reason merely of her nonage, and in such case the deed will not be void as to the husband (c).

Where the husband by his own deed to which the wife is no party, conveys his own interest in the lands of his wife, such deed is not open to the objections arising out of the statutes (d).

(a) See post, chapter on mortgages.

(b) *Toler v. Slater*, L. R. 3 Q. B. 42.

(c) *Doran v. Reid*, 13 C. P. U. C. 400 per Richards, C. J.

(d) Would such conveyance be valid to pass any estate as tenant by the curtesy to a stranger, if made before birth of issue and before 14

It is apprehended that even though the conveyance by husband and wife should be invalid to pass any estate of either, that the covenants for title of the husband, if any, are valid as matters of contract; and that a grantee for value might after eviction recover adequate damages on the covenant for quiet enjoyment (a), or enforce specific performance against the husband to the extent of his interest on the covenant for further assurance.

Liabilities of husband on his covenants for title, where the deed is invalid to pass estate.

The nature of the interest of the husband in the lands of his wife at common law, and under the Con. Stat. ch. 73, both as regards his marital right during the joint lives of himself and his wife, and as tenant by the curtesy initiate, and consummate on death of the wife, is treated of in considering the Con. Stat., ch. 73. Such interest, and the validity of conveyance of it, is of importance in the not uncommon case of conveyance by husband and wife of her inheritance and his interest in it, void certainly as to wife for non-compliance with the act.

The interest of the husband in lands of the wife.

The question of necessity for compliance with the terms of this act on a conveyance by a married woman of her estate which is settled to her separate use either by virtue of the Con. Stat. ch. 73, or by deed or devise, is treated of in considering that statute, as also her power to devise such estate.

Question of power of the wife to dispose of her separate property as a *feme sole* without examination, &c.

A release under the Registry act by a married woman of a mortgage to her is considered in discussing the laws as to mortgages.

Release of mortgage.

Probably this act virtually repeals the act of 32, H. 8, ch. 28, under which husband and wife by indenture can demise for three lives or twenty-one years, so as to bind the wife and her heirs, under certain conditions and restrictions. The point admits perhaps of doubt as the acts are all enabling acts.

Leases under 32 H. 8, c. 28.

& 15 Vic. ch. 7, s. 5, Con. Stat. ch. 90, allowing conveyances of contingent interests. See observances on that act, p. 70 and on the question of conveyance of contingent right to dower, p. 69, note c. 78.

(a) As to damages recoverable, see p. 104,

The deed not to have greater effect than if she was sole. 8. No deed of a married woman executed according to the provisions of this Act shall have any greater effect than the same would have had if such married woman had been sole. 1 W. 4, c. 2, s. 2.

Fee for certificate 9. The sum of one dollar may be demanded for every such certificate. 59 G. 3, c. 3, s. 2,—1 W. 4, c. 2, s. 4.

Recital. 10. And whereas it is expedient to provide for cases in which, before the Fourth day of May, one thousand eight hundred and fifty-nine, informal or erroneous certificates had been indorsed upon Deeds conveying real estate executed by married women jointly with their husbands, as well as for cases in which such Deeds had been executed in presence of and certificates endorsed thereon by non-resident Justices of the Peace, or in which certificates had been endorsed on such deeds subsequent to the execution thereof: Therefore, Whenever any certificate on the back of any Deed executed before the said Fourth day of May, one thousand eight hundred and fifty-nine, by any married woman, pursuant to the Act of the Parliament of Upper Canada, passed in the first year of the reign of his late Majesty King William the Fourth, chapter two, or pursuant to the Act of the said Parliament of Upper Canada, passed in the second year of Her Majesty's reign, chapter six, has been signed by two Justices of the Peace, such certificate shall be held and is hereby declared to be valid and effectual for all the purposes contemplated by said Acts, although the said Justices were not at the time residents of the District or County in which such married woman resided; and every Deed executed before the said Fourth day of May, one thousand eight hundred and fifty-nine, in the presence of such Justices, and every such certificate so signed shall have the same force, validity and effect as if the said Deed had been executed in the presence of, and such certificate had been signed by two Justices of the Peace of the District or County in which such married woman at the time of the execution thereof resided. 22 V. c. 35 (1859) s. 1.

Certificate under former acts to be valid, though the justices were not resident in the county or district in which the married woman resided.

Certificate to be valid tho' given subsequent to the execution of the deed. 11. When any certificate on the back of any Deed executed by any married woman, pursuant to the Act in the last preceding section first mentioned, had, before the said Fourth day of May, one thousand eight hundred and fifty-nine, been given on any day subsequent to the execution of such Deed, such certificate shall be deemed and be taken to have been given on the day on which the said Deed was executed; and such Deed shall be as good

and valid in law as if such certificate had been in fact signed on the day of the execution of the Deed to which it relates, as required by the said Act. 22 V. c. 35, s. 2.

12. In case any married woman seized of or entitled to real estate in Upper Canada, and being of the age of twenty-one years, did, before the said Fourth day of May, one thousand eight hundred and fifty-nine, execute, jointly with her husband, a Deed for the conveyance of the same, knowing her estate therein and intending to convey the same, such deed shall be taken and considered as a valid conveyance of the land therein mentioned, and the execution thereof shall be deemed and taken to be valid and effectual to pass the estate of such married woman in the said land, although a certificate of her consent to be barred of her right of Dower of and in such land, instead of a certificate of her consent to convey her estate in the same was endorsed thereon. 22 V. c. 35, s. 3.

Deed executed by a married woman jointly with her husband to be a good conveyance notwithstanding errors in certificate endorsed.

13. Whenever, before the Fourth day of May, one thousand eight hundred and fifty-nine, the requirements of the Acts of the former Parliament of Upper Canada, or of the Parliament of the Province of Canada, respecting the conveyance of real estate in Upper Canada by married women, while respectively in force, had been complied with on the execution by any married woman of a deed of conveyance of real estate in Upper Canada then belonging to such married woman, such execution shall be deemed and taken to be valid and effectual to pass the estate of such married woman in the land intended to be conveyed, although the certificate endorsed on such Deed be not in strict conformity with the forms prescribed by the said Acts, or any or either of them. 22 V. c. 35, s. 4.

And notwithstanding the certificate be not in strict conformity to the forms in the said acts.

14. The four last preceding sections of this Act shall not render valid any conveyance to the prejudice of any title subsequently acquired from the married woman, by Deed duly executed and certified as by law required, nor any conveyance from the married woman which was not executed in good faith, nor any conveyance of land of which the married woman or those claiming under her was or were in the actual possession or enjoyment on the said Fourth day of May, one thousand eight hundred and fifty-nine, notwithstanding such conveyance. 22 V. c. 35, s. 5.

Act not to prejudice titles subsequently acquired, &c.

15. The requirements necessary to give validity at law to a conveyance by a married woman of any of her real estate with

Requirements formerly necessary, to continue to be so as to future conveyances. respect to Deeds of conveyance executed since the Fourth day of May, one thousand eight hundred and fifty-nine, or after the passing of this Act, shall continue to be necessary for that purpose notwithstanding anything contained in the five last preceding sections of this Act; But this section shall not affect any other remedy at law or in equity which a purchaser or other person may have upon any contract or deed of a married woman executed since the said Fourth day of May, one thousand eight hundred and fifty-nine, or which may after this Act takes effect be executed in respect of her real estate. 22 V. c, 35, s. 6 (1859.)

32 Vic., c. 9, s. 2. The Act of '32 Vic., ch. 9, sec. 2, is as follows :

One certificate may embrace examination of several married women.

2. In case more than one married woman executes the same deed of conveyance mentioned and referred to in the second section of chapter eighty-five of the Consolidated Statutes of Upper Canada, the Judge or Justices of the Peace, therein mentioned, may include the examination and names of all or any number of such married women in one certificate in the form mentioned and set out in said section as far as applicable.

The necessity for this enactment?

This enactment leads to the belief that there certainly must be some decided case shewing the necessity for legislative interference, and that one certificate would not suffice under the consolidated act. If the object of the enactment had been merely to save the expense of several certificates, it would have been worded differently. In deference to such possible decision the author abstains from any expression of opinion as to whether the power professed to be given by this act has not always existed under the consolidated statute. He may say however, that if there be no such decision, it might, in any case dependant on one certificate including several examinations, be prudent not to assume that such certificate is faulty merely by reason of the Legislature having acted on that supposition.

CON. STAT. CH. 73.

An Act respecting certain separate rights of property of Married Women.

SECTIONS 1, 2, 3, 4, 19 & 20.

1. Every woman, who has married since the Fourth day of May, one thousand eight hundred and fifty-nine, or who marries after this Act takes effect, without any marriage contract or settlement, shall and may, notwithstanding her coverture, have, hold and enjoy all her real and personal property, whether belonging to her before marriage, or acquired by her by inheritance, devise, bequest or gift, or as next of kin to an intestate or in any other way after marriage, free from the debts and obligations of her husband and from his control or disposition without her consent, in as full and ample a manner as if she continued sole and unmarried, any law, usage or custom to the contrary notwithstanding; but this clause shall not extend to any property received by a married woman from her husband during coverture. 22 V. c. 34, s. 1, (1859.)

A married woman may hold her property free from the debts or control of her husband.

2. Every woman who, on or before the said Fourth day of May, one thousand eight hundred and fifty-nine, married without any marriage contract or settlement, shall and may, from and after the said Fourth day of May, one thousand eight hundred and fifty-nine, notwithstanding her coverture, have, hold and enjoy all her real estate not then, that is on the said Fourth day of May, taken possession of by the husband, by himself or his tenants, and all her personal property not then reduced into the possession of her husband, whether belonging to her before marriage or in any way acquired by her after marriage, free from his debts and obligations contracted after the said Fourth day of May, one thousand eight hundred and fifty-nine, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried; any law, usage or custom to the contrary notwithstanding. 22 V. c. 34, s. 2, (1859.)

A woman married before 4th May, 1859, may hold property not reduced to possession of her husband.

This Act
not to prevent
seizure in exe-
cution in cer-
tain cases.

3. Nothing herein contained shall be construed to protect the property of a married woman from seizure and sale on any execution against her husband for her torts ; and in such case, execution shall first be levied on her separate property. *Ibid.* s. 3.

Not to affect
tenancy by
curtesy.

4. No conveyance or other act of a wife in respect of her real estate shall deprive her husband of any estate he may become entitled to as a tenant by the curtesy. *Ibid.* s. 4.

Act not to af-
fect marriage
settlements,
&c.

19. Nothing in this Act contained shall be construed to prevent any ante-nuptial settlement or contract being made in the same manner and with the same effect as such contract or settlement might be made if this Act had not been passed ; but notwithstanding any such contract or settlement, any separate, real or personal property of a married woman, acquired either before or after marriage, and not coming under or being effected by such contract or settlement, shall be subject to the provisions of this Act, in the same manner as if no such contract or settlement had been made ; and as to such property, and her personal earnings and any acquisitions therefrom, such woman shall be considered as having married without any marriage contract or settlement. 22 V. c. 34, s. 20, (1859).

As to pro-
perty not
coming within
the contract.

20. This Act shall apply and be construed retrospectively to the fourth May, one thousand eight hundred and fifty-nine, as well as prospectively, so as to give full operation and effect thereto as from the time of the passing of the 22 V. c. 34, (1859).

This Act so far as it relates to real estate is so completely subversive of the former law, and there is such dearth of cases on it, that any remarks of the author would be little more than a series of opinions on a very obscure act, and remarks on the act are confined to so much thereof as effects real estate.

Rights of the
husband at
common law
in lands of
his wife.

To appreciate the change wrought by this act, a brief sketch of the rights of the husband in the property of his wife at common law may be proper (a)

His right dur-
ing their joint
lives.

As regards the freeholds of the wife, at common law, and independently of any question of right as tenant by the curtesy, " by the marriage the husband acquires, and during

(a) See also, as to alienation of the husband's interest, remarks on ss. 5 & 11 of Con. Stat. ch. 90, pp. 69, note c. 70.

the marriage enjoys, a freehold interest in his wife's real estate (of freehold) for their *joint lives*; both being seised together in her right by entireties; the effect of which is to put the ownership for the coverture entirely in the husband's power. Hence he can alienate this ownership at pleasure; and his conveyance will pass the freehold without the wife's co-operation (a). It has even been said that the conveyance by the husband would pass the whole inheritance of the wife, subject only to the right of entry of the wife and her heirs (b). On birth of issue capable of inheriting, the husband as tenant by the curtesy initiate, has a larger interest (c); and this interest becomes still further enlarged when the husband becomes tenant by the curtesy consummate on the death of the wife. The husband's right as tenant by the curtesy is not excluded by conveyance to his wife to her separate use, unless the intention to exclude him be clear, in which case equity would restrain his exercise of his strict legal right (d). Though this act in the language of Draper, C. J., hereafter referred to "operates by making a marriage settlement," there is by the 16th and 4th sections evidence that the husband shall not be deprived of tenancy by the curtesy.

as tenant by
by the cur-
tesy.

As regards the chattels real of the wife held by her in her own right, either in possession or reversion, the husband at common law had during the coverture complete control and right of disposition thereof, so that though the wife survived she would have no right as against any sale, conveyance, or disposition made by the husband; unless by no possibility could they have vested in the wife during coverture (e): they were liable in execution for his

As to chattels
real of the
wife.

(a) Macqueen on husband and wife, 27; see also Allan v. Levesconte 15 Q. B. U. C. 10; Gillespie v. Grover, 3 Grant, 590 per Esten, V.C.

(b) 1 Preston on abstracts, 3 ed. p. 334; Wallis v. Burton, 5 Grant, 358 per Esten, V.C.; but see per Vankoughnet, C. p. 354.

(c) 2 Blackstone Com. 128, Co. Litt. 30; as to conveyance by the husband of his contingent interest as tenant by the curtesy, see remarks on Con. Stat. ch. 90, s. 5. p. 69, note c. 70.

(d) Bennet v. Davis, 2 P. Wms. 316; Steadman v. Palling, 3 Atk. 423, 427. See further, Shelford Stats. 7 ed. 446; Bowle's case, Tud. Lg. Ca. 2 ed. p. 49.

(e) Duberley v Day, 16 Bea. 33.

debts, and became his if he survived his wife by his mere marital right: but if he made no disposition in his lifetime, and died before the wife, he could not dispose thereof by will, as they had not been transferred from the wife, and she would have become entitled.

Husband's right as to choses in action of the wife.

Independently of conveyance by way of fine, or of statutory enactment by this act, or Con. Stat. ch. 85, the husband had power to reduce into possession the *choses in action* of the wife, not settled to her separate use, and to assign or dispose thereof, and no act of the wife alone could deprive him of that right. If they were not reduced into possession during the joint lives of the husband and wife, he became entitled as administrator. If she survived him she retained all not reduced into possession. If however, the interest of the wife were reversionary, and not capable of reduction into possession, and so continued during the coverture, and the wife survived, then a disposition by husband and wife did not bind the wife. If the husband survived, he being entitled by the survivorship as administrator, the disposition would be good, and binding on him. If the reversionary interest should have become an interest in possession during the lives of the husband and wife, even a prior disposition by the husband alone would then have sufficed to have enabled his assignee to have obtained the subject matter thereof. If, however, the assignee could only have obtained it through the assistance of a court of Equity, his right was subject to *the wife's equity to a settlement*. This equity, shortly stated, is this: the court of Chancery will not assist, nor, if the wife dissent, allow, the husband or his assignee to recover or receive any property of the wife, recoverable only in that court, without settlement of a due proportion on the wife and children.

Wife's equity to a settlement.

What present power is there to dispose of reversionary interests, or

It will be seen that this act varies materially the law as above stated, and annuls the power of the husband, and if it gives to the wife no greater power than before to dispose of reversionary interests in *choses in action*, and in pure personalty, and interests, which though savoring of the realty, can only reach the wife as personalty, there would

seem to be no mode of effectual conveyance thereof, assuming as regards the latter interests that the Con. Stat. ch. 85 would not apply. interests savoring of realty?

The question of the power of disposal by husband and wife of her interest in real property, which is directed to be converted into, and is stamped as, personalty, and is not by the instrument under which she takes, directed to be for her separate use, is subject to some difficulty. Thus, if lands are conveyed or devised to trustees to be sold, and half the proceeds to be paid to the wife; or the interest of the proceeds are to be paid to a third person for life, and after his death half such proceeds to be paid to the wife; and till sale in either case the rents and profits to be paid over, as the interest would be paid if sold: or where a third person takes the legal estate for life, and after his death the lands are to be sold by trustees, and a proportion of the proceeds paid to the wife: what power is there in either case to dispose of the interest of the wife? If the proceeds are to be held for the separate use of the wife without restraint on anticipation, then, as hereafter explained, she may convey as a *feme sole*, whether her interest be in possession or reversion (*a*). But if the separate use were not created by the instrument, but only by force of this act, then, regarding the wife's interest as an interest in personalty, as it is by force of the direction to convert, her power so to dispose of her interest, even though not reversionary, is by no means clear (*b*). And where the interest, coming within the protection of this act, is *reversionary*, though the lands be not sold, it would seem it does not so far savor of the realty that conveyance by husband and wife executed and acknowledged pursuant to the Con. Stat. ch. 85, would suffice. The cases in England, establishing that a married woman jointly with her husband by deed executed and acknowledged pursuant to the Imperial act Realty directed to be converted,
for separate use.
Reversionary interest

(*a*) *Lechmere v. Brotheridge*, 9 Jur. N. S. 707, per Sir J. Romilly; *Keene v. Johnston*, 1 Jones & Carey, Irish Rep. 255.

(*b*) See *Chamberlain v. McDonald*, 14 Grant 447, per Mowat, V. C., post p. 278.

3 & 4 Wm. 4, ch. 74, can convey a reversionary interest in realty directed to be converted into personalty, and which can only reach her as such, do not appear to be applicable here. That act (sec. 77) gives power to a married woman to dispose of any estate in her lands of any tenure or in money, subject to be invested in the purchase of lands (which money in equity is land), providing the disposition shall not be valid unless the husband concur in the deed of disposition, and it be acknowledged as required by the act. By sec. 1, the word estate extends to any interest, charge, lien, or incumbrance, in, upon or affecting lands at law or in equity. Under that act, where a married woman was entitled to a fund to be raised out of real estate on the death of a tenant for life, it was held that a deed executed during the life of the tenant for life, by her and her husband, and the parties entitled to the estate, and acknowledged under the act, would not bar her right in case she survived (a).

In later cases this decision has been overruled, and it is settled that by deed under the act a reversionary interest of the wife in realty directed to be converted can be conveyed (b). These cases are grounded chiefly on the extended signification above referred to given in the word estate. The Con. Stat. ch. 85, however gives to the words "real estate" and "land" no signification beyond their usual import, and it may well be contended that the wife's reversionary interest in realty, which can only reach her as personalty, cannot effectually be disposed of.

Operation of
this act as a
marriage set-
tlement.

Draper, C. J., in reference to this act has observed (c), "I think it may be said to operate by making a marriage settlement for every woman, who, having property of her own, has married since the 4th. May, 1859, without any marriage contract or settlement; and also for every woman who on or before that same day, having property of her

(a) *Hobby v. Allen*, 15 Jur. 835, 20 L. J. Ch. 199, s. c. .

(b) *Briggs v. Chamberlain*, 11 Hare 69; *Tuer v. Turner*, 20 Bea. 560: see as to conveyance by the wife, or husband and wife, of her interests, *Shelford Stats.*, 7 ed. p. 389, 396; *Davidson Conv.* 2nd ed. vol. 2, p. 112, note.

(c) *Commercial Bank v. Lett*, 24 Q. B. U. C. 555.

own married without such contract or settlement." Section 19 should not be overlooked in considering sections 1 & 2, for the latter part thereof has an important bearing on the subject matter of the first sections.

In a case wherein it was held that notwithstanding this act a married woman could not convey as a *feme sole*, there are some remarks as to the effect of section 13 on sections 1, 2, & 19, as follows: "The wife in this case took the estate by force of the deed from her father. Being a married woman at the time, her husband, if there was issue of the marriage, would have an inchoate right as tenant by the curtesy; and the 13th section of the act appears to us intended to go further, and to recognise that by virtue of the marriage the husband acquired other estates or interests in the wife's real estate, for otherwise the provision that such estate or interest should not be subject to his debts would be useless. During the wife's life his estate or interest as tenant by the curtesy would not be consummate, and could not be made so subject, and therefore we apprehend the statute must refer to the estate he has as being jointly seised with his wife, and in her right, during the coverture, of her real estate, and then he is a necessary party to the conveyance of such estate" (a).

But though to pass the *legal* estate the Con. Stat. ch. 85 must be complied with, still a conveyance invalid at law may be valid in equity as presently explained to pass the equitable interest, at least where the separate use is created otherwise than by force of the act.

As to section 4, it is difficult to understand its sense or object, so far as it relates to a conveyance by the wife. It implies that a married woman could convey as a *feme sole* without her husband's consent, and not only that, but also that by her sole conveyance she could deprive him of his estate as tenant by curtesy, the which she could no more do than a husband by his sole conveyance could deprive

The wife cannot convey legal estate without compliance with Con. St. c. 85.

but it is otherwise as to her equitable interest.

Section 4.

(a) *Emrich v. Sullivan*, 25 Q. B. U. C. 107. See also *Royal Canadian Bank v. Mitchell*, 14 Grant, 412, per *Spragge*, V. C.; and *Chamberlain v. McDonald*, 14 Grant, 447.

his wife of right to dower. As the wife cannot convey but with her husband's assent as required by Con. Stat. ch. 85 (a), he has without the aid of this section complete control to prevent his interest from being defeated. So far as this section relates to an act of the wife other than a conveyance depriving the husband of his estate, it is framed apparently under the supposition that if her estate were sold in execution against her under the provisions of the statute, the husband might thereby lose his interest.

This section and section 16 afford an argument to shew that notwithstanding the act settles property on a woman to her separate use, her husband's right as tenant by the curtesy is not thereby excluded.

Can any but the wife question validity of conveyance by the husband of his com. law interest?

As regards conveyance by a husband of his common law right in his wife's lands valid at common law, but which under this act might be invalid for want of consent of the wife, Richards, C. J., has remarked "it may be questionable whether any person but the wife, or some one claiming under her or for her benefit, can under this act raise the question how far the disposition of the property was without the consent of the wife (b).

Her power to contract or dispose of personality.

The act gives a married woman at law no greater power to contract than she had before (c). In a recent case Mowat, V. C., remarked that he saw "great difficulty in holding that a married woman has under the act no power of disposing of her personal property except by will (d). The wording of the act as to enjoying personality is the same as in respect of realty, and it is settled she cannot convey realty as a *feme sole*, but this, as presently stated, may be by reason of the *original* Act of 22 Vic. ch 35.

(a) Emrich v. Sullivan, 25 Q. B. U. C. 105. Ante p. 277.

(b) Doran v. Reid, 13 C. P. U. C. 401; see also Emrich v. Sullivan, 25 Q. B. U. C. 107, per Draper, C. J.

(c) Kraemer v. Glass, 10 C. P. U. C. 473, per Draper, C. J.; see Wright v. Gardner, now pending in Queen's Bench; and on the construction of the act generally, Commercial Bank v. Lett, 24 Q. B. U. C. 552.

(d) Chamberlain v. McDonald, 14 Grant 447.

The question as to the power of a married, woman *of full age* to dispose of her real estate (a) by will, or by instrument *inter vivos*, without the consent of her husband and the formalities required by Con. Stat. ch. 85, as distinct from the right to exercise a power or authority to appoint may be considered under the following heads :

1. Where the legal estate is vested in her, but not for separate use by force of this statute ch. 73, or otherwise.

2. Where it is only the beneficial equitable interest which is so vested in her, and also not for her separate use.

3. Where the legal estate is in the wife, and as coming under the provisions of this act, is for her separate use, or is so by virtue of the instrument under which she takes, and without restraint on alienation.

4. Where the legal estate is by deed or will vested, not in her, but in trustees for her separate use without restraint on alienation.

5. In the above cases the power to dispose by will.

In the first case, as before mentioned, it has been held that the common law incapacity remains, and the wife can only convey as authorized by Con. Stat. ch. 85.

In the second case, "Equity follows the Law, and preserving the analogy between legal and equitable estates, requires that the equitable estates of married women, shall be conveyed *inter vivos*, in the same manner as a legal estate (b)."

As regards the third case ; where the legal estate is in the wife, and by virtue of this act is for her separate use ; it is to be observed that the *original* statute 22 Vic. ch. 35 (Con. Stat. ch. 85), enacts that "the requirements heretofore necessary to give validity at law to a conveyance by a married woman of any of her real estate; shall continue to be necessary for that purpose with respect to deeds of conveyance executed after the passing of this act, notwithstanding anything contained in this act, or in any act which has been or may be passed during the (then) present session of Parliament ;" Stat. 22 Vic. ch. 34 (Con. Stat. ch. 73), was

How far a married woman can by instrument *inter vivos* dispose of lands as a *feme sole*, without examination, &c., or consent of husband.

1st Where the legal estate is in her but not for separate use by force of this act, or otherwise.

2nd. Where only the equitable interest is in her, not for her separate use.

3rd. Where legal estate is in the wife, and is for separate use by force of this act.

(a) As to realty directed to be converted, reversary interests, and choses in action ; see pp. 275, 276.

(b) Per Westbury, C., in *Taylor v. Meads*, 11 Jur. N. S. 167.

passed in the same session: Con. Stat. ch. 85 makes no mention of this: but from *Bank U. C. v. Brough* (a), it appears that the original act can be looked at to guide in construing the Consolidated Statutes, at least if there be no direct conflict of expression. It must be admitted that in favor of her right to convey ss. 4 & 16 afford an argument, by enacting that no conveyance or will of a married woman shall deprive her husband of his tenancy by the curtesy, but as before remarked, section 4 on that point would appear to have little meaning in it. It has however, been decided that where the wife has in her the legal estate for her separate use by force of this act, that to pass the estate *at law* the Con. Stat. ch. 85 must be complied with (b). And where the legal estate is held by the wife for her separate use otherwise than by force of this act, then also to pass the estate *at law* chapter 85 must be complied with.

or by the instrument under which she takes,

Conveyance by the wife if invalid at law to pass legal estate may be valid in equity to pass equitable interest where separate use is created otherwise than by the act,

Where on a conveyance for value the estate should fail to pass at law for non-compliance with the act, and the separate use is created otherwise than by the act, still on the principles which govern (c) in the fourth case now next to be considered, such conveyance might be recognized and enforced in equity as a good disposition by the *feme* of her *equitable* interest. It would appear, however, that it would be otherwise where the separate use is created by force of the act, for the *jus disponendi* which a married women possesses of property settled to her separate use by will or instrument *inter vivos* is withheld by this act (d).

4th. Where legal estate is in trustees for separate use of the wife.

In the fourth case, it is now settled that the Con. Stat. ch. 85 will not apply, and that in equity the conveyance by the wife as a *feme sole* by deed or will to the extent of her interest in fee or otherwise, is a good disposition of the trust which the trustees must obey (e).

(a) 2 Err. & App. Rep. U. C. 101.

(b) *Emrich v. Sullivan*, 25 Q. B. U. C. 105; see also *Royal Canadian Bank v. Mitchell*, 14 Grant, 412; *Chamberlain v. McDonald*, 14 Grant, 447.

(c) See Sugd. Concise View, 147; *Smith Rl. Prop.* 3 ed. 1076.

(d) *Royal Canadian Bank v. Mitchell*, 14 Grant, 412.

(e) *Taylor v. Meads*, 11 Jur. N. S. 166; Lord Chancellor overruling *Buckell v. Blenkhorn*, 5 Hare, 131, and *Lechmere v. Brotheridge*, 32 Bea. 353; see also *Hall v. Waterhouse*, 11 Jur. N. S. 361, *V. C. Stewart*.

Fifthly, a married woman has in the first and second cases no power to devise, her common law incapacity remains (*a*). In the fourth case she has such power (*b*). In the third case; as to that branch of it which refers to the legal estate being vested in the wife, and held for her separate use otherwise than by force of ch. 73; it would seem that the same principles which govern, as above mentioned, in the case of conveyance *inter vivos*, in determining whether the legal or equitable estate would pass, also govern as regards disposition by will, and that the wife can devise as she thinks proper. As regards that other branch of the case which refers to the legal estate being held by the wife for her separate use, by force of this act, the act must govern; it limits somewhat the right to devise by requiring that it be exercised first in favor of children, and dispenses possibly to some extent with the formalities required in other cases on execution of a will; its language is as follows:

SECTION 16.

16. From and after the said fourth day of May, one thousand eight hundred and fifty-nine, and hereafter, every married woman may, by devise or bequest executed in the presence of two or more witnesses neither of whom is her husband, make any devise or bequest of her separate property, real or personal, or of any rights therein, whether such property was or be acquired before or after marriage, to or among her child or children issue of any marriage, and failing there being any issue, then to her husband, or as she may see fit, in the same manner as if she were sole and unmarried; but her husband shall not be deprived by such devise or bequest of any right he may have acquired as tenant by the curtesy. 22 Vic. ch. 34, s. 16.

Married woman may devise or bequeath her separate property, &c.

At common law no estate in lands, greater than for term of years, could be disposed of by will. Under the Statute of Wills, 32 H. 8, ch. 1, as explained and declared by 34 & 35 H. 8, ch. 5, all persons might devise to any other person two-thirds of their lands held in chivalry, and all held in socage; and when tenures in knight service were converted into socage tenures by the Stat. 12 Car. 2, ch. 24, all lands

Right to devise at common law.

under Stat. of Wills.

(*a*) Per Westbury, C. in *Taylor v. Meads*, *supra*. (*b*) See last note.

Exceptions as to married women, infants, idiots. became devisable except copyholds. The first statute did not exclude married women, infants or idiots, but the second act, which was declaratory and explanatory of the former, enacts by sec. 14 that "wills or testaments made of any manors, lands, tenements, or other hereditaments by any woman covert, or person within the age of twenty-one years, idiot, or by any person of non sane memory, shall not be taken to be good or effectual in the law." The sole power therefore, of a married woman to devise lands (as distinct from the right to exercise a power of appointment) rests on the Consolidated Statute.

How under this Act must a will be executed?

St. of Frauds.

Con. Stat. ch. 82, s. 13.

How the will must be executed is not clear. The Statute of Frauds requires that a will of lands should be in writing signed by the party devising, or by some other in his presence, and by his express directions, and attested and subscribed in his presence by three or four credible witnesses. The Con. Stat. ch. 82, sec. 13, substitutes two for three witnesses, and renders it sufficient if they have subscribed in presence of each other, though they may not have subscribed in presence of the testator (*a*). It will be observed this act, ch. 73, does not exclude an infant from capacity to devise, and is silent as to the credibility of the witnesses, and as to the witnesses signing in presence of the testatrix, or of each other, or in fact at all; and the question arises whether the words "in the same manner as if she were sole and unmarried" render necessary the formalities required in other cases. Do those words refer to the *mode* of execution, or merely to the *power* to devise, "failing there being any issue, to the husband, or as she may see fit?" It may be urged that as the mode of execution is expressly provided for by enjoining execution in presence of two or more witnesses that the words in question refer to the power, and that if they relate to the mode of execution, the former provision is superfluous, except indeed so far as excluding the husband as a witness is concerned. The courts no doubt would endeavor to give to

(a) As to the construction of these acts as regards wills, see observations on Con. Stat. ch. 82, s. 13, p. 291.

the will of a married woman the same protection against fraud, which the Legislature by the Statute of Frauds and the Consolidated Statute have accorded to all devises of real estate; and considering this, and that the express provision made by the act as to the mode of execution may be said to be made merely for the purpose of excluding the husband as a witness, the probability is that the mode of execution of the will of a married woman to pass lands must be in the same manner as if she were sole and unmarried.

So also it would seem that those words, "in the same manner as if she were sole and unmarried," will govern on the question of capacity of a married woman not of age to devise. So far as the question is not governed by those words, the Statutes of Wills of Henry, above referred to, furnish argument by analogy. On their construction it has been said, that though the second act expressly excluded infants, idiots, and married women from the powers given by the first under apprehension it might extend to them (a), yet that this was not requisite, and that only those who had power to alienate before the act were thereby enabled to devise (b).

Can an infant devise under this act.

As regards the omission of the word *credible* in reference to the witnesses (c), the Con. Stat. ch. 82, s. 13, is equally silent, and it has been held that that act only operates to change the number, and not the character of the witnesses (d): moreover, if the words, "in the same manner as if she were sole" govern, as apparently they do, the execution must be as in other cases.

Must the witnesses be credible?

In limiting the power to devise to the husband, or generally to the case of their being no child, issue of *any* marriage, the act seems not to preclude the right to devise generally, in case of grandchildren only being living; for though the word *issue* uncontrolled by the context, will

If there be no child, but a grandchild, the wife can devise generally.

(a) Jarman on Wills, 3rd ed. 28.

(b) Powell on Devises, 3rd ed. 125, 126; Dyer, 354 B.; 1 Ves. Sr. 300.

(c) As to the Statute of Frauds in regard to credibility, see remarks under Con. Stat. ch. 82, s. 13, p. 291.

(d) Ryan v. Devereux, 26 Q. B. U. C. 100

extend to descendants generally, in this section it is so controlled, and it relates to the immediately antecedent words, "child or children." It is apprehended that although the words "child or children," either in a statute (a) or a will (b) may sometimes include grandchildren, that in this section and section 17 they will be construed according to their strict sense.

It was hardly necessary to enact that a devise or *bequest* by the wife of her real or personal property should not deprive the husband of his tenancy by the curtesy; for, as regards the subject matter of a bequest, it never yet conferred an estate by the curtesy; and even in the case of a devise by the wife of a fee simple (the only *devisable* estate which could confer an estate by the curtesy), she could no more by devise deprive the husband of such estate, than he by his devise could deprive her of her dower.

SECTION 17.

Separate personal property of wife dying intestate, how to be distributed.

17. The separate personal property of a married woman dying intestate shall be distributed in the same proportions between her husband and children as the personal property of a husband dying intestate is distributed between his wife and children; and if there be no child or children living at the death of the wife so dying intestate, then such property shall pass or be distributed as if this Act had not been passed. 22 Vic. ch. 34, s. 18.

Does the word child include grandchild?

In this section as in section 16, it would seem the words "child or children" will not extend to grandchildren (c) but the construction is by no means clear, inasmuch as in the case of a husband dying intestate grandchildren are entitled.

The mode of succession to the personalty of an intestate husband leaving a widow and issue has been before referred to (d).

(a) See s. 42 of Con. Stat. ch. 82, and the remarks thereon and cases, ante, p. 193.

(b) See last note.

(c) See remarks on section 16.

(d) Ante pp. 204, 205.

If no child be living on the death of the wife intestate the husband will be entitled either as at common law by force of his marital right, or as entitled to administration, according to the nature and position of the property (a).

SECTION 13.

13. Any estate or interest to which a husband may, by virtue of his marriage, be entitled in the real property of his wife, whether acquired before or after the fourth day of May, one thousand eight hundred and fifty-nine, or after this Act takes effect, shall not during her life be subject to the debts of the husband, but this provision shall not effect the right which any person, by or under any judgment or execution obtained against the husband, had obtained in respect of any such estate or interest acquired by a husband before the said fourth day of May, one thousand eight hundred and fifty-nine. 22 Vic. ch. 34, s. 13.

Estate to which a husband is entitled in the property of his wife, not subject to his debts during her life.

It is difficult to say what estate or interest is here alluded to. The object seems to have been to benefit the wife through the medium of the husband at the expense of his creditors. As before explained apart from this act the estate or interest to which a husband is entitled by virtue of the marriage in the freeholds of the wife is a freehold estate during the coverture giving right to the pernanacy of the profits, and after death of the wife and birth of heritable issue he would be entitled as tenant by the curtesy. As regards chattels real he had complete power of disposition during coverture. What estate or interest is protected by this section? Is it the right to the pernanacy of the profits, a right which was saleable on execution against him (b), or the contingent interest by the curtesy, which was also saleable (c), or both these interests? It is not probable that the Legislature intended to restrain the sale during coverture of the interest as tenant by the

(a) Wms. Exrs. 6th ed., 1376, 656, 815; 29 Car. 2, ch. 3, s. 25; ante, p. 273.

(b) Dalton 186. Ante p. 273.

(c) See ante 69, note c. 71, 273; and Moffatt v. Grover, 4 C. P. U. C. 402.

curtesy, for as it only takes effect after death of the wife the sale in her life time could be of no detriment to her. As regards the husband's right to pernancy of the profits of freeholds of the wife and to dispose of her chattels real, during coverture, that right is taken away by sections 1 2 & 19, except under section 2 in the case of real or personal estate taken possession of by the husband before 4th May, 1859; as regards real estate so taken possession of section 13 would seem to apply. So also, though the realty were not taken possession of section 2 would not protect the husband's interest against his debts contracted before 4th May, 1859, and here again section 13 would seem to apply to protect during life of the wife except in case of judgment or execution before such day (a).

(a) See as to this section *Emrick v. Sullivan*, ante p. 277.

WILLS.

Con. Stat. Ch. 82, Sections 11, 12, 13, and the
Act of 32 Vic. Ch. 8.

SECTION 11.

11. When the will of any person who shall die after the sixth day of March, one thousand eight hundred and thirty-four, contains a devise in any form of words of all such real estate as the testator shall die seized or possessed of, or of any part or proportion thereof, such will shall be valid and effectual to pass any land that may have been or may be acquired by the deviser after the making of such will, in the same manner as if the title thereto had been acquired before the making thereof. 4 W. 4, c. 1, s. 49.

Estates acquired after the making of a will may pass by the will where such intention is expressed.

The provisions of the Consolidated Statute are still all important, as the Act of Victoria only applies to testators dead after 1st January, 1869.

The important variance between this section and the Act of Victoria taken from the Imp. Stat. 1 Vic. ch. 26, must be borne in mind, and it will be seen that by reason of this variance, the cases on the later acts, hereafter treated of, do not apply here. Under them every will speaks from the death of the testator, unless intention to the contrary appear. Under the Consolidated Act the burden of proof, so to speak, is the other way, and after acquired real estate will not pass unless such an intention appear.

Varies from Imperial Act and Prov. Act of Victoria.

A will of lands under the Statute of Wills was considered not so much in the nature of a testament, as of a conveyance declaring the uses to which the land should be subject (a); and a testator could no more devise freehold real estate to be acquired after his will than he could or now can, (except under Con. Stat. ch. 90, s. 5) convey at law by instru-

By the former law a will could not pass after acquired freeholds,

(a) 2 Bl. Com. 378; Doe d. Baker v. Clark, 7 Q. B. U. C. 44.

ment *inter vivos* in anticipation of acquisition (a). The will as to freeholds spoke from its date, and was only valid as to then acquired freeholds, though it should expressly profess to deal with after acquired property.

Personal estate acquired after the will could pass.

Personal estate, including chattels real, was not governed by the same rules as freehold interests, and might pass though acquired after the will. There was, however, a distinction as regards chattels real, and also as between a general and a specific bequest. Thus, a bequest of "all my leasehold estates," *prima facie*, and in the absence of anything from which the contrary could be inferred, spoke from the date of the will, and did not include after-acquired leaseholds, or a renewed lease, unless there were an intention apparent to that effect (b).

Bequest of "all my leaseholds" meant present leaseholds.

A codicil might have the effect of republication of the will so as to pass after acquired property.

A codicil had *prima facie* the effect of republishing the will, so as to make it speak from the date of the codicil, and include lands acquired before the codicil (c); but the codicil had not this effect if it shewed any intention to deal only with the specific property devised and no more (d).

General bequest of "all my leaseholds" before the act, stood on same footing as a devise of "all my freeholds" afterwards; in neither case would they pass if acquired after the will.

It has been stated above that under a mere general bequest "of all my leasehold estates" without more, leaseholds acquired after the will did not pass. For this there is the authority of Lord Eldon, who says (e), "a leasehold interest for years may be disposed of by a will made before the testator acquired that interest, but the general doctrine is, that you must shew that intention." Applying this observation to the section now under consideration, it would seem that as regards freeholds, a mere general devise "of all my lands" after the Statute of William stood in the same position as a general bequest of leaseholds before that act. After acquired freeholds by the Statute of

(a) That a deed may operate by way of estoppel, and the estoppel be fee on the acquisition of the estate does not preclude the above statement.

(b) *James v. Dean*, 11 Ves. 390.

(c) *Goodtitle v. Meridith*, 2 M. & S. 5; *Re Earl's Trusts*, 4 K. & J. 673.

(d) *Bowes v. Bowes*, 2 B. & P. 500; *Monypenny v. Bristow*, 2 R. & M. 117, 132.

(e) *James v. Dean*, 11 Ves. 390.

William were made as capable of being devised as after-acquired leaseholds were before the act, but in each case the intention to pass must be apparent. In the absence of intention apparent a general gift was ambiguous, for it might mean to refer either to property which the testator had at the making of the will, or might have at the time of his death. It has been held that under a general devise of "all my real and personal estate" the Consolidated Statute would not operate to carry after acquired freeholds (a).

Under general devise of "all my real estate," after-acquired property will not pass.

SECTION 12.

12. Whenever land is or shall be devised in a will made by any person who shall die after the sixth day of March, one thousand eight hundred and thirty-four, it shall be considered that the deviser intended to devise all such estate as he was seized of in the same land, whether fee simple or otherwise, unless it appears upon the face of such will that he intended to devise only an estate for life, or other estate less than he was seised of at the time of making the will containing such devise. 4 W. 4, c. 1, s. 50.

A devise of land shall be taken to carry as large an estate as the testator had in the land, unless a contrary intention be expressed.

The language of the Imperial Act, 1 Vic. ch. 26, s. 28 is much as in this section.

Resembles the Imp. Act.

Under the old law a devise to A, simply, would pass no more than a life-estate, unless it appeared that the testator intended to devise a larger or other estate. By this section the burden of proof is shifted, and on such devise the fee or whole estate of the deviser will pass, unless intention to the contrary appears (b). It will be for those who contend for a restricted effect of the will to make out the intention.

The former law.

The act only applies to estates and interests existing in the testator, and not to those first created by the will. Thus, a devise to A of a rent charge held by the testator in fee will pass the fee; but if the testator devise to A an an-

The Act does not apply to estates created *de novo* by the will, as on devise of an

(a) *Whateley v. Whateley*, 14 Grant 430, *Mowat, V. C., diss.*; see also *Gibson v. Gibson*, 1 Drew. 62, per *Kindersley, V. C.*

(b) See *Farrell v. Farrell*, 26 Q. B. U. C. 652, as to an indefinite devise passing the fee, and the circumstances which favor such construction.

annuity to A secured by way of rent charge.

Instances wherein before the act indefinite devise would be enlarged to a fee.

nuity, and charge it on his land, A will take but a life-interest (a).

The principles and rules of construction which govern under the old law in determining as to whether a fee or life-estate only passes, are yet important in ambiguous wills. Even before this act an indefinite devise would be enlarged to a fee by the imposition of a charge, however small, on the *person* of the devisee, as on a devise to A "he paying my debts:" or on the quantum of the estate devised, as on a devise of lands to A, "my debts being paid thereout:" but not if the lands were first expressly charged, and the devise were merely subject to the charge (b). So also, if there were a gift over on the devisee dying under a specified age (c); or under age and without issue (d).

SECTION 13.

Witnesses need not subscribe in the presence of the testator.

13. Any will affecting land executed after the sixth day of March, one thousand eight hundred and thirty-four, in the presence of and attested by two or more witnesses, shall have the same validity and effect as if executed in the presence of and attested by three witnesses; and it shall be sufficient if such witnesses subscribe their names in presence of each other, although their names may not be subscribed in presence of the testator. 4 W. 4, ch. 1, s. 51.

The provisions of section 5 of the Statute of Frauds (29 Car. 2, ch. 3), are as follows:

Provisions of St. of Frauds.

"All devises and bequests of any lands and tenements devisable either by force of the Statute of Wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or of any particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his

(a) *Nichols v. Hawkes*, 10 Hare 342; *Beay v. Rawlinson*, 7 Jur. N. S. 118.

(b) *Doe d. Stevens v. Soelling*, 5 East, 87, 98, per Le Blanc, J.; *Doe d. Sams v. Garlick*, 14 M. & W. 698, per Parke, B.; *Burton v. Power*, 3 K. & J. 170; *Ingalls v. Arnold*, 14 Q. B. U. C. 296.

(c) *Burke v. Annis*, 11 Hare, 232; *Frogmorton v. Holyday*, 3 Bur. 1618; *Doe Wight v. Cundall*, 9 East, 400.

(d) *Toovey v. Bassett*, 10 East, 460.

presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else shall be utterly void, and of none effect."

The variance between the Statutes of Charles and of William is this: that by the former, the will must be attested and subscribed *in presence of the testator by three, or four credible witnesses*, who need not subscribe or attest in presence of each other, or at one and the same time: the latter statute is silent as to the credibility of the witnesses, and execution in the presence of and attested by two witnesses, is as valid as if in the presence of, and attested by three witnesses; and it is sufficient if such witnesses subscribe in presence of each other, without subscribing (as required by the Statute of Charles) in the presence of the testator.

Notwithstanding the Act of William is silent as to credibility of the witnesses, that qualification still continues to be requisite as under the Act of Charles (a).

The St. of Charles is not impliedly repealed by that of William (b). It seems clear therefore that a will invalid as not complying with the latter act, is valid if it complies with the former. In a late case (c) the court went further, and held in effect that the statutes were cumulative, and might be read together, and so that a will invalid under either statute taken singly might be supported on their joint authority. Thus a will executed in the presence of two witnesses who subscribed in the presence of the testator, but not in presence of each other has been held sufficient. The author does not presume to question the unanimous judgment of the Court, but he deems it right in a matter of such importance to refer to the language of Draper, C. J. in a subsequent case, and to suggest that it may be a proper precaution always to comply with the Statute of William,

Variance between Stat. of Charles and of Wm.

Witnesses must be credible as under St. of Frauds.

St. of Frauds not repealed, and a will complying with either act will suffice.

Can the two acts be amalgamated, so that a Will valid under neither individually may yet be upheld by their joint effect?

(a) Ryan v. Devereux, 26 Q. B. U. C. 107.

(b) Crawford v. Curragh, 15 C. P. U. C. 55.

(c) Crawford v. Curragh, supra,

and require that where there are only two witnesses, they should sign in presence of each other. In the case referred to (*a*), Draper, C. J., alluding to the doctrine laid down in *Crawford v. Curragh*, says "I advisedly abstain from expressing an opinion of concurrence in, or dissent from, that decision. I have not arrived at any positive conclusion upon it."

Variance between this and the Imp. Act.

The practitioner should bear in mind that the Imp. Act, 1 Vic. ch. 26, has in England varied the mode of execution of wills, and therefore the cases decided under that act may be inapplicable here, unless on the words "signature," "presence," "direction," "other person," "attested," "subscribed," which are common to the Imperial Act of Victoria, the Statute of Frauds, and the Provincial Act.

Attestation clause.

Presumption of due execution.

The attestation clause need not shew that the requisites of the statutes have been complied with, and whether shewn or not, proof of due execution must be given. Due execution may however be presumed; and possession for a lengthened period (in one case 16 years) in those claiming under the devise, coupled with evidence that the witnesses are dead, or do not remember, and especially if the possession were with the knowledge of the heir-at-law, are matters from which due execution may be inferred (*b*).

In the Court of Probate in England it has been held that the maxim *omnia rite esse acta* will to a limited extent apply even though the witnesses should not remember all the facts requisite to the due execution, and the attestation clause should be informal (*c*). The same court also, where the will on its face appeared to have been duly signed, granted probate, though the witnesses denied their signatures, on being satisfied by other evidence of due execution, and that the denial of the witnesses was wilfully untrue (*d*): but if the witnesses deny due execution, and there be no evidence rebutting their testimony, and their

(*a*) *Ryan v. Devereux*, 26 Q. B. U. C. 107.

(*b*) *Crawford v. Curragh*, 15 C. P. U. C. 55; see also 1 Jarm. Wills. 3 ed. 79.

(*c*) *Vinnicombe v. Butler*, 13 W. R. 392; *Rees*, in the goods of, 34 L. J. Prob. 56.

(*d*) *Myers v. Gibson*, 14 W. R. 901.

veracity is not impeached, the court will not pronounce for the will, though the attestation shew due execution (a).

Execution of a will by a married woman made under Con. Stat. ch. 73, s. 16 is considered in treating of that statute. Will of married woman.

32 VIC. CH. 8.

AN ACT TO AMEND THE LAW AS TO WILLS.

1. Every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will. Every will speaks from death of testator,

By section 6 the act shall not apply to the will of any person who is dead before the first day of January, 1868. who dies after 31st January. 1868. Sec. 6.

The act is taken from the Imperial Act of 1 Vic. ch. 26, and numerous cases decided on it are available, especially on the sometimes very difficult questions of intention on the face of the will that it shall not speak from death of the testator. This Act taken from Imp. Act 1 Vic., c. 26.

Under this act on a general devise under the expression "all my real and personal estate" property acquired after the making of the will will pass (b), though in strictness it cannot be said that such property is in the words of the act *comprised* in the will.

As to personal estate, except chattels real (c), the general rule before the act was that a will spoke from death of testator.

A residuary devise under the former law was regarded as a specific devise of such lands as the testator then had which he had not disposed of by his will, and such lands only would pass by the residuary devise. This was a consequence of regarding the will as a present conveyance (d). Residuary devise will not carry property as to which a devise may have lapsed.

If therefore a testator seised of Blackacre and Whiteacre devised the former to A and the residue of his lands to B, and A died in the lifetime of the testator, whereby the devise to him lapsed, B would still not take Blackacre. The

(a) *Croft v. Croft*, 4 Swa. & T. 10.

(b) *Gibson v. Gibson*, 1 Drew. 62.

(d) *Ante* p. 287; 1 Jar. on Wills, 8 ed. 610.

(c) *Ante* p. 288

same doctrine applied on the devise to A failing by his disclaimer, or the illegality of the devise as contrary to the Statute of Mortmain, the rule against perpetuities, or otherwise. The Imperial Act expressly provides (sec. 25) that unless intention to the contrary appear the subject matter of the devise which fails shall be included in the residuary devise. It may be questionable whether this accords with the general intention of a testator who perhaps has disposed of the bulk of large property to others than the residuary devisee, and shewn but slight intention of benefiting him. It is conceived that this section of the Imperial Act was designedly omitted in the Provincial Act, and that in its absence, though the will speaks from death of the testator, and is no longer to be regarded as a present conveyance, yet the mere fact of the devise being residuary, which is intended to be but a devise of what has not been excepted, and, as in the case above, is intended only to carry Whiteacre under the name of residue, would be sufficient evidence of intention that the subject matter of the devise which fails should not pass to the residuary devisee (a).

Will of minor who attains majority invalid.

Act does not apply to the objects of testator's bounty.

Though the will is to speak from the death of the testator, still it would seem clear that a will made by a minor who dies after majority is not valid.

This section does not apply to the objects of the testator's bounty, who are to take the real and personal estate given by the will, but only to the real and personal estate comprised in the will. A testator bequeathed the income arising from certain funds to A, a widow, for life or until her marriage, and after her death or marriage, which should first happen, he gave the principal amongst her children by two former husbands: A married again between the date of the will and the death of the testator, and he was aware of her marriage: it was held, overruling the

(a) That a residuary devise in England is no longer to be treated as specific, see *Hensman v. Fryer* L. R. 2 Eq. 627 wherein however stress was laid on the effect of section 25 of the Wills Act: see *Clark v. Clark*, 34 L. J. Ch. 477; *Pearmain v. Gwise*, 2 Giff. 130.

decision of Vice Chancellor Wood, that A was not entitled to the income of the funds, but that the gift, upon her decease or marriage, came at once into operation (a).

Section 2 is hereafter treated of in conjunction with section 4.

SECTION 3.

3. Every will shall be revoked by the marriage of the testator, Will, except except a will made in exercise of a power of appointment when made in exercise of a power, revoked by marriage. the real or personal estate thereby appointed would, in default of such appointment, pass to the testator's heir, executor or administrator, or the person entitled as the testator's next of kin under the Statute of Distributions.

By section 6 the act does not apply to the will of one who is dead before 1st January, 1869.

As a general rule marriage of a man coupled with birth of issue revoked his will made before marriage, and the mere marriage of a woman was a revocation of her will. The former law.

If a man before marriage has by his will made gifts to his relatives or others, and has after marriage made no new will or codicil confirming, or reiterating his will, relying on the absence of issue of the marriage as not revoking it, it will now be necessary that he should make a new will, or republish the old one. Necessity under new law of republishing existing wills in certain cases.

In England it has been held that a void marriage, as with a deceased wife's sister after the Act of 5 & 6 William 4, ch. 54, which makes such marriage void, will not revoke a will (b). Void marriage as with deceased wife's sister no revocation.

Though this act has been held not to apply to the colonies still it was in the same case considered that such a marriage here is void, though under certain circumstances, as for the purpose of bastardizing issue, it cannot be called in question after the death of the parties (c).

The act provides that marriage shall not revoke the will, where it is made in exercise of a power, when the estate appointed would not pass to the testator's heir, executor or

(a) *Ballock v. Bennett* 24 L. J. ch. 512, 397; 7 De G., M. & G. 283; A. C. 3 Burr.

(b) *Mette v. Mette*, 1 Swa. & Trist., 416.

(c) See p. 215 as to dower. *Hodgins v. McNeil*, 9 Grant, 305.

administrator, or next of kin, for the only effect of annulling such a will would be, not to vest the property in the new family of the testator, but to carry it over to the persons entitled in default of appointment.

But it is not necessary that the property, in default of appointment, *must* go to the new family if he have any, but only that it *may*; for if a man have a general power of appointment with the limitation in default of appointment to himself in fee, and having a son by his first marriage, make his will and marry again; his will will be revoked; and yet if he die intestate the estate will descend to the son by the first marriage, in exclusion of the issue by the second. Where in default of appointment the estate is limited to a particular class of issue as purchasers, for example, to all or any of the children of a first marriage, the second marriage will not revoke the will; because although in default of appointment the heir may take; yet it will not be in the character or with the quality of heir (a). And where the will was made under a power in a settlement, and then the testator married, and if there had been no will, the same persons would have taken either under the settlement or the intestacy; it was held that there was no revocation, for the persons entitled in the event of an intestacy would take under the settlement, and not under the Statute of Distributions (b).

SECTIONS 2, 4.

No conveyance, &c., to prevent operation of a will as to such interest as exists on death.

2. No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real or personal estate therein comprised (except an act by which the will is revoked) shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of at the time of his death.

No revocation by change in circumstances.

4. No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

(a) H. Sugden Wills, 55, 56.

(b) In re Sir Charles Fitzroy, 1 Swa. & Trist, 133.

Under the old law the general rule was that if a testator seised of a freehold estate devised his whole interest, and then aliened the same to the extent of such interest, the will was revoked: but if the alienation were not to the extent of the whole interest, as if a testator seised in fee should have demised for life or a less estate, the revocation was *pro tanto* only, and the devisee would have taken subject to the demise. Though a conveyance of a freehold estate were for no definite object, it revoked a previous devise; thus if the lands devised, should after the will have been conveyed to the testators use for life with remainder to his right heirs, so that it merely operated to revest the fee, the devise was revoked. Even an ineffectual conveyance had the same effect.

Old law as to revocation by implication, revoked by conveyance, unless conveyance were of a partial interest only.

Where however, the conveyance was a mere charge, as in case of a mortgage in fee with power of redemption to the mortgagor, in the usual form, the will was not wholly revoked in equity, but merely to the extent of the charge, and the devisee took *cum onere* (a).

Not revoked by a mortgage or mere charge.

A contract to convey or settle lands theretofore devised operated in equity, though not at law, as a revocation or ademption of the devise, and this it would seem would be so, though the contract should have been rescinded in the testator's life-time (b); so also if the lands were sold under compulsory powers given to a railway company (c).

Revoked in equity by contract to sell, even though rescinded, or sale compulsory.

A contract for sale, unless such whereof specific performance would not be enforced, will now as formerly, as regards the beneficial interest, be a revocation of a prior devise of the lands sold, and the unpaid purchase money will go to the executor or next of kin entitled to have the contract carried out for their benefit, but the legal estate will go to the devisee (d). If however the contract have been abandoned

Revocation under the new law, on contract of sale.

(a) As to right to exoneration, see 29 Vic. ch. 28, sec. 33, ante p. 45.

(b) 1 Jarm. Wills, 3 ed. 150.

(c) Gale v. Gale, 21 Bea. 349; Smith Rl. Prop. 3 ed. 988; see however 1 Jarm. Wills, 3 ed. 152.

(d) Farrar v. Earl of Winterton, 5 Bea. 1; 1 Jarm. Wills, 3 ed. 152; Sug. Stat. 2 ed. 360, Moore v. Raisbeck, 12; Ford v. DePontes, 30 Bea. 72.

the property will now pass under the will contrary to the old law (a).

On contract to purchase.

If a man having a term of years contract for the fee, and then devise the estate and die before the conveyance, the equitable fee will pass as before the statute, and the term will attend it (b): if the conveyance were made to the purchaser, or to a trustee for him, simply in fee, or pursuant to the contract before death, the devise would stand good both under the former and the present law (c).

Effect after devise of conveyance by the deviser, of his whole estate relimiting to himself a partial interest.

The act "goes much further than simply to leave the will to operate on such interest as the testator has left in him under a conveyance subsequently to his will, for the will is to operate on such estate or interest as the testator has power to dispose of at the time of his death: therefore if a man were to make a will disposing of his real estate, and afterwards were to convey the whole fee to uses, or on trusts, relimiting or leaving any interest in himself, that interest would pass by his will; and still further, if he were afterwards to convey to a purchaser his remaining interest, and at a subsequent period repurchase the property, and die seised of it, it would pass by his will to the devisee (d).

Effect of sec. 3 may be in some cases to necessitate republication of wills now executed.

As the act by section 6 will apply to all wills except those of testators who die before 1st January, 1869, it will be requisite that testators should consider how far their intentions may be varied by the new act. Thus, if a testator having made his will disposing of some of his real estate in a particular way, should afterwards by post nuptial settlement before the act have granted such estate to the use of his wife for life and after her death to his own use in fee, and have made no alteration in his will, relying on the same being by the old law revoked by the conveyance, quoad the property conveyed (e), and in fact so intending, he would find such intention defeated by this act.

(a) Sug. Vend. 14 ed. 191.

(b) Sug. Stat. 2 ed. 364.

(c) 1 Jarm. Wills, 3 ed. 144, 145. (d) Sugd. Vend. 14 ed. 191.

(e) 1 Jarm. Wills, 3 ed. 136, ante p. 297.

SECTION 5.

5. No Will or Codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another Will or Codicil executed according to law, or by some writing declaring an intention to revoke the same, and executed in the manner in which a Will is by law required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some one in his presence and by his direction, with the intention of revoking the same.

Sec. 5. How only a will may be revoked.

The 21st section of the English act has not been enacted here. It provides that no obliteration, interlineation or other alteration shall have any effect, except so far as the words or effect of the will shall not be apparent, unless such alterations shall be executed as the act requires.

SECTION 6.

6. This Act shall not apply to the Will of any person who is dead before the first day of January, one thousand eight hundred and sixty-nine.

Sec. 6. Act does not apply to the will of one who dies before 1 Jan.

As this section does not exempt from the operation of 1869. the act, wills executed before the first day of January, 1869, it may be requisite in some cases by reason of the change the new law works on such wills (as in the instances before given) that testators should republish their wills (a).

The power and mode of devising by a married woman is considered in treating of Con. Stat. ch. 73.

Devise by married woman.

(a) See ante pp. 298, 295.

SALE AND TITLE UNDER EXECUTION.

STATUTES.

- 13 Ed. 1, c. 18, St. Westminster—*Fieri Facias* and *Elegit*.
- 33 Hen. 8, c. 39—Crown Debts.
- 13 Eliz. c. 4—Crown Accountants.
- 29 C. 2, c. 3, ss. 14, 15—Signing Judgment—Purchasers.
- 4 & 5 W. & M. c. 20—Docketing Judgments—Purchasers.
- 5 Geo. 2, c. 7, s. 4—*Fieri Facias* against lands—Pleadings and proceedings in suits against executors to reach lands.
- 2 & 3 Vic. c. 11, s. 8, Imp.—Registry of Crown Debtors and Accountants.
- 24 Vic. c. 41—Repeal of Registry of Judgment—Judgments no lien on land.
- 27 “ c. 13, s. 1—Sale of equity of redemption. See chapter on mortgages.
- “ “ c. 13, s. 2—Renewal of executions.
- “ “ c. 15—Sales of lands on *fieri facias* against executors.
- 29 “ c. 28, s. 28—Crown debts.
- 29 & 30 Vic. c. 42, ss. 5, 6—Issuing of *fieri facias* lands—Return of writs against goods in order of priority.
- “ “ c. 43—Abolition of binding effect of Crown bonds.
- 31 Vic. c. 20, ss. 58, 59—Registry of Sheriffs’ deeds.
- “ c. 25—Lands and goods in one writ—Return, &c.
- Con. Stat. c. 5—Registry of Crown bonds.
- “ c. 22, s. 249—Renewal of writs.
- “ c. 22, s. 252—Lands and goods not to be in one writ—Sale, &c.
- “ c. 22, ss. 257, 258, 259—Sale of equity of redemption. See chapter on mortgages.
- “ c. 22, s. 261—Seizure of mortgage. See chapter on mortgages.
- “ c. 22, s. 268—Advertising, seizure, &c.
- “ c. 22, s. 269—Sheriff vacating office.
- “ c. 89, ss. 48, 49—Registry of judgments.
- “ c. 90, ss. 5, 11—Sale of contingent interests. See chapter on that Act.

In order properly to consider this subject it will be necessary to consider the state of the law in England as well as here.

The Statute of Westminster 2, 13 Ed. 1, ch. 18, was the first which gave a judgment creditor a right to proceed against the lands of his debtor. Under that statute the judgment creditor may "have a *fiery facias* to the sheriff to levy his debt on the lands and chattels of the debtor, or that the sheriff shall deliver to him all the chattels of the debtor (saving only oxen and beasts of the plough) and the half of his land, until the debt be levied, on a reasonable price or extent." It is from the election given by the statute to adopt one of the two remedies that the writ of *elegit* derives its name, and from the entry of the award of this on the judgment roll, "*quod elegit sibi executionem*," &c. Before this statute, a man could only have satisfaction of goods, chattels, and the *present profits* of the lands by the writs of *fiery facias* or *levary facias*, but not the possession of the lands themselves, which was a natural consequence of the feudal principles which prevented the alienation, and of course the encumbering of the fief with the debts of the owner. And when the restriction on alienation began to wear away, the consequence still continued, and no creditor could take possession of the lands, but only levy the growing profits, so that if the defendant aliened his lands the plaintiff was ousted of his remedy; the statute, therefore, granted the writ of *elegit*. The writ of *fiery facias* only affected the goods of the debtor, and the sheriff sold them under it: the writ of *levary facias* affected the goods and the *present profits* of the lands of the debtor, but not the lands themselves, and under it the sheriff was not authorized to sell or extend the lands, or deliver them to the creditor; but could only proceed to collect the rents and profits. Both these writs are yet in force in England: the latter however, has become almost obsolete, from the more advantageous remedy given by the writ of *elegit*; whilst to the former extended operation has been given in England and here, so as to affect other per-

St. Westminster gave first a remedy against lands by a writ of *elegit*.

sonal estate than was theretofore liable to seizure under it.

It will be observed that the statute does not authorize the sheriff to sell the goods of the debtor under the writ of *elegit*, but to deliver them to the plaintiff. If the plaintiff desired to *sell* the goods, the course was to issue a *fi. fa.*; and it is said to be more advisable to sue out a *fi. fa.* against goods in the first instance, and afterwards, if they are not sufficient, to sue out an *elegit*. The practice on the writ of *elegit* is for the sheriff to impanel a jury, who appraise the goods and the annual value of the lands; the sheriff delivers the goods to the plaintiff at the appraised value, and if they be sufficient the lands cannot be extended, but if insufficient the lands are extended. The sheriff does not give actual possession of the lands extended, and the plaintiff gets possession as he best can, sometimes being driven to an action of ejectment. And when the creditor is satisfied out of the profits of the lands, the debtor is entitled to have the lands back again. Under this Statute of Westminster only half the lands could be extended under the writ; and when there were two *elegit* creditors, and the first had a moiety, the other had a moiety of the remaining moiety. So also the interest of a *cestui que trust*, and certain other interests of debtors in lands were not to be reached under execution. By the Statute of Frauds however, as will be hereafter more fully explained, the interests of *cestuis que trust* are made subject to execution; and by Imp. Stat. 1 & 2 Vic. ch. 110, the remedy by *elegit* is extended to all the lands of the debtor, and to estates in lands over which the debtor has such disposing power, as he might, without the assent of any other person, exercise for his own benefit.

The proceedings by writ of *elegit* have been briefly referred to, not only because an acquaintance with them is requisite to understand the cases wherein the writ or its effect is alluded to, but because it may be perhaps that such writ might issue in this country (a); it should be borne in mind however,

(a) *Rymal v. Ashberry*, 12 C. P. U. C. 342; *Doe d. Henderson v. Burch*, 2 Q. B. O. S. U. C. 514. See post p. 312.

that on any such writ issued in this country, no Imperial statute subsequent to 17th January, 1822, in regard to such writ, would apply (a), and therefore the writ could not have the extended effect given to it by later Imperial enactments.

The only writs of execution in use in this country affecting property, except where the Crown is concerned, are the writs of *feri facias*, and of *venditioni exponas*, and the writ of *sequestration*, the latter only issuing out of Chancery (b).

It may be well to consider 1st, the operation of the writ of *feri facias* as regards personal interests in lands liable to seizure under such a writ against goods; 2nd, its operation as regards other estates not being personal, and only to be affected under such a writ against lands.

The writ of *feri facias* against goods has by provincial legislative enactments, a much wider operation than it had at common law (c); and also, as regards both goods and lands, may now issue when it could not at common law, as for instance to enforce payment of money payable under decree or order of the Court of Chancery, or by any rule or order of the common law courts (d). The operation of the writ against goods as regards personal interests in lands in any way will alone be considered.

Under the writ against *goods*, the sheriff at common law can sell no estate of freehold, unless perhaps an estate *pur autre vie* (e); but he may sell a lease or term of years belonging to the defendant, as also a term of years belonging to the wife of the defendant, the execution and sale by the sheriff having the same effect as to reduction into possession, as a disposal by the husband himself; if however such term is the separate estate of the wife under the Con. Stat. ch. 73, then it cannot be sold. If a lease for years contain a covenant by the lessor with the lessee to

Fi. fa. against goods.

What interest in lands can be sold under *fi. fa.* against goods.

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- (a) See Con. Stat. c. 9, s. 2. (b) Con. Stat. ch. 24, ss. 21, 19.
 (c) Con Stat. ch. 22, ss. 257, 260, 261.
 (d) Con. Stat. ch. 24, s. 19. (e) Johnson v. Streete, Comb. 290.

convey to him the fee on payment of a named sum, on sale of the lessee's interest under execution against goods, the right of preemption will not pass (a). An annuity for years may, but an annuity for life may not be sold under a writ against goods. The sale of interests of *cestuis que trust*, by virtue of the Statute of Frauds, is considered hereafter, as also what distinction there may be between sales under an *elegit* and under the writ of *fieri facias*. Under this writ the sheriff cannot sell part of a lessee's interest (b), nor can he, it has been said, on sale of the term, turn an occupant out of possession to give possession to a purchaser, who may therefore have to resort to an action of ejectment to obtain possession (c). The assignment by the sheriff of the debtor's interest, is affected both by the Statute of Frauds (d) and the Provincial Registry Acts, and therefore, unless within the exceptions in these acts, must be in writing and registered (e).

Sale under, is within Stat. of Frauds and Registry Act.

By St. of Frauds binds from delivery only to sheriff as against purchasers.

At common law the writ bound from the teste, but this hardship was removed by 29 Car. 2, ch. 3, s. 16, which enacted that the writ should only bind from its *delivery* to the sheriff to be executed. This extends only to purchasers for value, and not to the defendant himself, as to whom the writ binds still from its teste, and therefore if he die after the teste and before delivery to the Sheriff the writ can be proceeded on (f).

Fi. fa. against lands given by Imp. St. 5 Geo. 2, c. 7.

The writ of *fieri facias* against *lands* in this province rests on Imperial Statute 5 Geo. 2, ch. 7, by the 4th section of which it is enacted that—

After the 29th September, 1732, the houses, lands, negroes and other hereditaments, and real estates situate or being within any of the said plantations (i. e., British plantations in America),

(a) *Henrihan v. Gallagher*, 9 Grant, 488; 2 Err. & App. 338, S. C. overruling on that point; *Sampson v. McArthur*, 8 Grant, 72.

(b) *Osborne v. Kerr*, 17 Q. B. U. C. 134.

(c) *Doe Tiffany v. Miller*, per Burns, J., 10 Q. B. U. C. 80, 81; *Doe d. Hughes v. Jones*, 9 M. & W. 373, *arguendo*, referring to *Rex v. Deane*, 2 Show, 85.

(d) *Doe Hughes v. Jones*, *supra*.

(e) *Witham v. Smith*, 5 Grant, 203; 31 Vic. ch. 20, s. 58.

(f) Post p. 313, n. b.

belonging to any person indebted, shall be liable to and chargeable with all just debts, duties and demands of what nature or kind soever, owing by any such person to his Majesty or any of his subjects, and shall and may be assets for the satisfaction thereof *in like manner as real estates are by the law of England* liable to the satisfaction of debts due by bond or other specialty, and shall be *subject to the like remedies, proceedings and process* in any court of law or equity in any of the said plantations respectively, for seizing, extending, selling or disposing of any such houses, lands, negroes, and other hereditaments and real estates, towards the satisfaction of such debts, duties and demands, and in like manner *as personal estates* in any of the said plantations respectively, are seised, extended, sold or disposed of for the satisfaction of debts.

Negroes it will be observed, are classed with other hereditaments, which now appears singular, but as observed by the learned Chief Justice, in *Gardiner v. Gardiner* (a), in many of the American colonies at the time of the passing of the act, negroes were as a usual thing considered part of the estate, and in some of them were so by positive law, in which respect they occupied the same position as the serfs in Russia till recently. This statute was repealed as to negroes by 37 Geo. 2, ch. 119.

The leading case on this statute, and sales by force of it under a *fi. fa.*, is *Gardiner v. Gardiner* (b). In that case the action was brought on a simple contract debt of the testator. Among other pleas, *plene administravit* was pleaded, to which plaintiff replied lands of which the testator died seised, as assets in defendant's hands liable to satisfy the debt, and the defendant rejoined that administration had never been granted to him of such lands, to which the plaintiff demurred, and had judgment on the demurrer, Macaulay, J., *dissentiente*. On the authority of this case, many others have been decided, on questions chiefly arising on the pleadings. There is great difficulty in ap-

Gardiner v. Gardiner.

(a) 2 Q. B. O. S. 520.

(b) Supra. See this case considered in *Reid v. Miller*, 24 Q. B. U. C. 610.

plying the statute to the case of a sale of a testator's or intestate's lands, and instances might be put where great incongruities might arise. It is not intended here to discuss the questions arising out of *Gardiner v. Gardiner*, for whatever doubts may have arisen on it, they are now removed by the Act of 27 Vic. ch. 15, apparently retrospective in its operation saving pending suits, which is as follows:—

27 VIC. CH. 15.

AN ACT RESPECTING SALES OF LAND UNDER EXECUTION
AGAINST EXECUTORS AND ADMINISTRATORS.

Assented to 15th October, 1863.

Preamble Imp. Act 5, Geo. 2, C. 7 cited. Whereas, the Courts in Upper Canada have held that under the Imperial Act fifth of George Second, chapter seven, section four, the title of a testator or intestate in real estate in Upper Canada, might be seized and sold under a judgment and execution, by a creditor of the testator or intestate recovered against an executor or administrator of the deceased, in the same manner and under the same process, that the same could be seized and sold if the said judgment and execution had been against the testator or intestate if living, and many sales have taken place, and titles been acquired under such proceedings, and it is desirable to quiet the same: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

Interest in Real Estate in the U. C. declared seizable on a judgment against an executor, &c. 1. Under the said Imperial Statute, the title and interest of a testator or intestate in real estate in Upper Canada might be, and hereafter may be seized and sold under a judgment and execution recovered by a creditor of the testator or intestate, against his executor and administrator, in the same manner and under the same process that the same could be sold under a judgment and execution against the deceased if living.

Sales under such seizure confirmed. 2. All such sales heretofore made and titles given thereunder are hereby declared to have passed and conveyed the title or interest of the testator or intestate in his real estate so sold and conveyed, as against any objection that may be made on the ground that real estate could not be seized and sold in the manner

aforesaid under the said Act; provided always that this Act shall not affect any case pending at the time of the passing of this Act, in or theretofore finally adjudged by the courts of Law or Equity in Upper Canada.

Proviso Act
not to affect
pending or
decided cases.

The sale of an equity of redemption on a suit against the mortgagor or his personal representatives is considered in treating of mortgages.

Sale of equity
of redemption.

Lands cannot be sold under a judgment against an executor *de son tort* (a).

Executor *de
son tort*.

The mode of pleading by a plaintiff or defendant in ordinary cases where the defendant is sued in his representative character should, according to the cases (b), be as follows: The defendant should, if he admits the debt, and has fully administered, plead *plene administravit*. This he must do, otherwise a judgment by default would be an admission of assets, and he would be personally liable as for a *devastavit*, if there were no goods of the testator to satisfy the judgment, and the judgment itself would be evidence of assets. If the nature of the case requires some other plea, as a judgment recovered against the defendant and no assets *ultra* (c), it should be pleaded accordingly. If the plaintiff admit the plea, he should then in his replication admit the truth of the plea, and pray judgment of assets *quando*, and may take a judgment by default as for

Pleadings in
suits against
executors.

(a) *Graham v. Nelson*, 6 C. P. U. C. 280.

(b) *Sickles v. Asselstine et al.*, 10 Q. B. U. C. 203; *Topping v. Yardington*, 6 C. P. U. C. 349; *Levisconte v. Dorland*, 17 Q. B. U. C. 437; *Mein et al v. Short et al.*, 9 C. P. U. C. 245, per Draper, C. J.; *Holton v. Macdonald*, 12 C. P. U. C. 246; *Mason v. Babington*, 17 C. P. U. C. 149; *Hogan v. Morrissey*, 14 C. P. U. C. 441; *Reid v. Miller*, 24 Q. B. U. C. 610.

(c) The Stat. 29 Vic., ch. 28. s. 28, abolishes the former priority of certain debts over others, and requires debts to "be paid *pari passu*, and without any preference or priority of debts of one rank or nature over those of another." If personal assets be actually on hand can an executor by allowing a creditor to obtain judgment thereby enable him to acquire priority as against other creditors in case of a deficiency of assets? It would seem that even though in case of personal assets this should be a *devastavit*, it would not be so as to real assets, over which the executor has no control; *ante* p. 35.

Pleadings in
suits against
executors.

want of a plea, which will be final or not without a reference or assessment according to the nature of the action: for though a plea is pleaded, it is not a plea in bar or preclusion of the action, or right of action, but rather in admission of it, and in bar only of personal liability as not chargeable with assets (*a*). In many cases where the plaintiff desires to proceed against the testator's lands, the replication has gone on to allege that the testator died seised of lands in Upper Canada, which by force of the statute are assets to satisfy the plaintiff's claim, and subject to the like process for satisfaction of debts as personal estate, (following the words of the statute), and averring that the plaintiff is a British subject: this mode, it would appear, it is not advisable to adopt, or rather it is improper (*b*) to *reply* at all anything in reference to the lands, but in regard to that, to enter a *suggestion* on the roll that the testator died seised, &c.; though it would seem no suggestion is necessary (*c*). One reason why the replication of lands should be avoided is that if lands be *replied*, it would seem it compels the defendant to rejoin in confession or otherwise; for unless he do rejoin the plaintiff may sign judgment, in which case he may strike out all the prior pleadings, and sign judgment as for want of a plea, and such a judgment would, as above explained, be an admission of assets. It would appear that a suggestion of lands, so far as regards the lands, cannot be traversed (*d*). It seems it is not requisite that the plaintiff should aver that he is a British subject, so as to bring himself within the Statute of George; that will be assumed on a suit in our courts (*e*), unless the defendants set it up by rejoinder to the replication if

(a) *Mason v. Babington*, 17 C. P. U. C. 149.

(b) *Hogan v. Morrissey*, 14 C. P. U. C. 441, and *Reid v. Miller*, 24 Q. B. U. C. 610, overruling *Sickles v. Asselstine*, 10 Q. B. U. C. 203.

(c) *Mason v. Babington*, *supra*; lands and goods are placed as regards execution on the same footing by the Statute of George, no suggestion is made as to goods, why should any be requisite as to lands?

(d) *Mein et al. v. Short*, 9 C. P. U. C. 245, per *Draper*, C. J.

(e) *Duncan v. Geary*, 10 Grant, 34, per *VanKoughnet*, C.

lands be replied, by plea to a suggestion (a). And it will be observed the Statute of Victoria is not expressly confined to British subjects, unless its connection with the Imperial Statute would still so confine it; and since that statute the suggestion may probably be drawn in a different and more concise form than heretofore the replication under the Statute of George.

In regard to execution on a judgment of assets *quando*, it has been held that no writ against goods can issue till a return of goods to a *sci. fa.* (b). It was also held in the same case that where the record shews that there are no goods, as on a plea of *plene administravit* admitted or found to be true, that the writ against lands can issue immediately on judgment without any writ against goods being issued. The state of the record in such case is equivalent to a return of no goods, and if a return of no goods were requisite before the writ against lands could be proceeded on, then if there were no goods, the lands could never be reached on a judgment of assets *quando*, as before the writ against goods can issue there must a finding of goods on inquisition on a *sci. fa.* It is apprehended that the act of 1868, allowing writs against lands and goods, will not affect the right to proceed now according to the above decision.

For some time it was doubted whether the act of Geo. 2 was in force in this province, as at the time of its passing Canada was not a British colony, and it was not considered clear that the Provincial Act 32 Geo. 3. ch. 1, introducing the law of England, did thereby introduce this statute which was not part of the general law of England. It was settled, however, on appeal to England, in a case of *Gray v. Willcocks* (c), that the statute was in force in Upper Canada.

(a) How and when such a defence should be set up, see *Wood v. Campbell*, 3 Q. B. U. C. 269; *Doe d. Richardson v. Dickson*, 2 Q. B. O. S. 295, per Robinson, C. J.; *Hearle v. Ross*, 15 Q. B. U. C. 262, 263.

(b) *Mason v. Babington*, 17 C. P. U. C. 149.

(c) See *Gardner v. Gardner*, 2 Q. B. O. S., per Robinson, C. J., p. 537.

What interests affected by the writ against lands.

The interests in real estate which are affected by the writ against lands, and the judgment on which it issues, from what time, and the course of proceeding to and after sale, are now to be considered.

Effect of judgments as binding lands.

In considering what interests are affected by the writ, it may be well to take a short retrospective view of the various Provincial Statutes rendering judgments liens on lands, and the cases on the subject ; for though the effect of judgments as a lien on lands is abolished by stat. 24 Vic. ch. 41, still questions are constantly arising as to the effect of such liens, and many titles depend on them.

As before remarked with reference to the writ of *elegit*, a judgment at the suit of a creditor did not, nor did any proceedings on it affect the lands of the debtor, from the early feudal doctrine that the tenant could not alien or encumber his land. In process of time this restraint somewhat wore away, but before the statute "*quia emptores*," it is generally thought the proprietor of lands was enabled to alien no more than the moiety (a) ;" so far as regarded the judgment creditor however, the consequence of the earliest feudal rule continued, till the Statute of Westminster 2 gave the writ of *elegit*, as above mentioned, and the statute therefore permitted only so much of the lands to be affected by the process of law as a man was capable of alienating by his own deed. On the passing of this statute a judgment became a lien on a moiety at least of the lands of the debtor, not only from the time of its actual recovery, but sometimes by a fiction of law, even from an antecedent period. Judgments at one time were only given in term when the Court sat ; and when subsequently certain judgments were allowed to be recovered and entered out of term, the appearance of their having been actually given in term was still kept up, and if entered in vacation, in most cases, they had relation back, and were entered as of the prior term, and of the first day of such term, and the execution on it usually was so tested. The consequence was that lands of a defendant were liable to be

(a) Black. Com. vol. 2, p. 161.

extended in the hands of a purchaser even though the judgment did not actually exist at the time of the purchase, if the judgment and writ related back to a time antecedent to the sale, *viz.*, to the first day of the term.

To remedy this it was provided by 29 Car. 2, ch. 3, ss. 14 & 15, that the day of the month and year of signing judgments be entered, and that as regards lands, they should only bind from the time of such entry as against *bona fide* purchasers for value, and not relate to the first day of the term; and to facilitate searches for judgments, it was

Judgment to bind only from entry, and relation back to first day of term taken away by St. of Frauds.

enacted by 4 & 5 W. & M. ch. 20, that an alphabetical list of the defendants' names should be kept by a docket thereof, and that no judgment not docketed should affect any purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in the administration of estates of their ancestors, or testators, or intestates.

4 & 5 W. & M. c. 20 required docketing.

The Statute of Charles was confined to purchasers, and did not apply as between the parties to the suit; and therefore, if a defendant died in vacation, judgment might still be entered as of the prior term when he was living, and it would be a good judgment; but by the effect of the statute it would not, as against purchasers for value, so relate back. Now however, by Rule of Court No. 47,

Rule of Court No. 47: judgments relate only to day when signed.

all judgments are to be entered of the day when signed, and have relation to no other day, unless by order. It must be borne in mind that *leasehold* property, which is not affected by the writ against lands, but only by that against goods, was by the Statute of Charles, as regards purchasers, bound only from the delivery to the sheriff of the writ; as between the parties however and personal representatives, it is bound from the teste (*a*), which is now the day of issuing (*b*). The Statute of George 2, which gives the writ of *fi. facias* against lands, places it on the same footing as the writ against goods; and therefore, it has been held that against purchasers, it binds not from the judgment or the teste but from the delivery to the sheriff to be executed. In this res-

Fi. fa. against lands on same footing as *fi. fa.* goods by 5 Geo. 2, and so binds only from delivery to sheriff as against purchasers.

(a) See post p. 313, n. b.

(b) Con. St. c. 22, s. 249.

Judgment no
lien on lands.

Of the writ of
elegit,

binds from
the teste.

pect it will be seen that its relation back was less than that of the writ of *elegit*, which referred to the docketing the judgment. It may be taken as now settled (a), that a judgment is not a lien on lands either for the purposes of an *elegit* or otherwise.

The writ of *elegit* was certainly introduced with the English law generally into Upper Canada. In one case (b) *Esten, V. C.*, seemed to consider that the case of *Doe d. Dempsey v. Boulton* (c) decided that the writ of *elegit* was not in force here: on reference to that case however, it will be seen that the language of the court was that "the Legislature knew that the process by *elegit* was never resorted to here, being considered to be superseded by the *fi. fa.* against lands under the 5 Geo. 2." In another case (d) wherein an *elegit* actually did issue, the right to issue it was not determined, though it was held that an *elegit* issued in March, 1827, could not relate back and prevail over a *fi. fa.* issued in May, 1826, under a conveyance was made by the sheriff in November, 1827. In a recent case (e) it is said it may be a question whether the writ of *elegit* may not be the proper remedy on a judgment against an heir on the debt of his ancestor. Admitting that an *elegit* will not relate back to the judgment for the purpose of binding lands, still it would seem to relate back to its teste, as the Statute of Frauds would not govern. Even a *fi. fa.* relates back to the teste, except by force of that statute as against purchasers (f). The consequence would be that an *elegit* tested before, though not delivered to the sheriff till after a sale by the defendant, would override the sale.

The *fi. fa.* against lands binds in the same way as that against goods, and as it owes its existence to the Statute

(a) See 24 Vic. ch. 41, s. 10, and *Gardner v. Juson*, 2 Er. & App. R. 204; *Doe d. McIntosh v. McDonell*, 4 Q. B. O. S. 195; *Doe d. Andjo v. Hollister*, 5 Q. B. O. S. 739.

(b) *Bank of Montreal v. Thompson*, 9 Grant, 51.

(c) 9 Q. B. U. C. 532.

(d) *Doe d. Henderson v. Burtch*, 2 Q. B. U. C. 514.

(e) *Rymall v. Ashberry*, 12 C. P. U. C. 339.

(f) See pp. 311, 313, n. b.

5 Geo. 2, before referred to, which declares that lands shall be subject to the "like remedies process and proceedings" as personal estate to satisfy debts, it follows that the writ against lands binds in like manner as the writ against goods, viz., by 29 Ch. 2, ch. 3, s. 16, as regards purchasers from delivery to the sheriff, though as regards the defendant himself and his heirs from the teste (a). This latter point may be of importance if the defendant should die after the teste, but before delivery to the sheriff, in which case the writ may still be proceeded on notwithstanding the lands had passed by descent or devise (b). And if the defendant die on the same day, and before the writ issues, it will still be valid and may be proceeded on, for the issuing the writ being a judicial act will be referred to period of the day earlier than the death (c).

Fi. fa. binds as against defendant, his heirs or devisee from its teste,

and though defendant die before it issues, if on the same day,

As between parties claiming to enforce their liens in equity against the equitable interest of the debtor after executions issued, it has been held that the executions bind and take priority and the parties are entitled according to the time of delivery of their respective writs to the sheriff, and not from the time that any one of them should first file a bill to enforce the claim (d).

binds in equity from delivery as against a subsequent execution creditor who first files his bill to enforce the equitable lien.

A purchaser for value buying in good faith from the heir or devisee cannot be disturbed by a subsequent judgment and execution founded on a simple contract debt of the ancestor (e).

Purchase from heir or devisee in good faith good as against subsequent execution.

The difficulty seems to be, however, as to what is a purchase in good faith. In *Reid v. Miller*, Parnall the purchaser from the heir, appeared not to have had any notice of debts due from the ancestor, and though the defendant, who claimed through Parnall, or a mesne purchaser, may have had such notice, yet he was entitled to the

(a) Ante p. 304, 311.

(b) *Doe d. Hagerman v. Strong*, 4 Q. B. U. C. 510; *Converse v. Michie*, 16 C. P. U. C. 167.

(c) *Converse v. Michie*, supra.

(d) *Moore v. Clark*, 11 Grant, 497. See post, p. 318, as to reaching equitable interests.

(e) *Reid v. Miller*, 24 Q. B. U. C. 610; see *Peck v. Buck*, Cha. Chamber Rep. 294; *Sug. Vendors*, 13 ed. 540; *Levisconte v. Dorland*, 17 Q. B. U. C. p. 437.

benefit of the rule that a purchaser with notice claiming from or through a purchaser without notice, is protected. It is suggested that on purchase from the heir or devisee, with notice of the insolvency of the ancestor or deviser, it would be a wise precaution, beyond other evidence of good faith, such as the giving a not entirely inadequate price, to see that the purchase money be properly applied in payment of debts.

Interests not
saleable under
f. fa. lands.

Rent seek.

Rent charge.

Widow's right
to dower.

Right of pur-
chase.

Vendor's in-
terest.

The following interests in real estate are not liable to sale under the writ of *fieri facias* against lands. Leaseholds, they being personalty; the interest of a mortgagee (*b*), he being *quasi* trustee for the mortgagor; a rent seek (*c*); and it has been doubted whether a rent charge with power of distress, secured on freehold estate can be sold under the writ; the statute Geo. 2. referring to houses, hereditaments, and real estate, &c., "situate and being in any of the said plantations," thus referring to something corporeal and visible, and which it was said did not in strictness include a rent charge on lands (*d*): such a rent charge is however extendible under an *elegit* even prior to the Imperial Act 1 & 2 Vic. ch. 110. A widow's right to dower before assignment has been held not to be saleable; but the right can be sold if the husband is alive (*e*). A right of purchase cannot be sold, and though granted in a lease and exercisable by the lessee and his assigns and the lease be sold under execution the right to purchase will not pass (*f*). Whether the interest of a vendor is saleable when he has entered into a valid contract of sale, or without such contract, is bound by a parol contract and part performance has been much questioned (*g*); it has been said he stands in the position of a mortgagee whose interest is not saleable. Prior to the statute 12 Vic. ch. 73, the interest of a mortgagor in lands could not be

(a) Parke v. Riley, 12 Grant, 69; 3 Err. & App. 215, S. C.

(b) Doe dem. Campbell v. Thompson, Hil. 6 Vic.; R. & H. Digest, 202.

(c) Dougall v. Turnbull, 8 Q. B. U. C. 622.

(d) Dougall v. Turnbull, 8. Q. B. U. C. 622. (e) See ante p. 69, *h.*, c. 70.

(f) Henrihan v. Gallaghe, ante 308 n. *g*.

(g) Parke v. Riley, 12 Grant, 69, 3 Err. & App., 215, S. C.

sold; by that statute, however, all the legal and equitable interest of a mortgagor may be taken in execution (a).

By the 10th section of the Statute of Frauds, the equitable interests of *cestuis que trust* are made liable to seizure and sale under execution; but it would seem that the trust estates saleable by virtue of that statute must be where the estate is held on a pure and simple trust, and not where the trust is of a special nature (b), and the statute does not extend to equitable estates in chattel interests (c).

Trust estates saleable under St. of Frauds, if the trusts are pure and simple trusts,

It has been doubted in one case (d) whether a trust estate is saleable at all in this country under a *fi. fa.* lands, and this doubt renders perhaps, the consideration of the question as to whether an *elegit* can issue, of more importance.

saleable under *fi. fa.* ?

The alienable qualities under execution or by conveyance from the party, at common law, and under Con. Stat. ch. 90, ss. 5. 11, of the marital interest of a husband in the lands of his wife, of his interest as tenant by the curtesy, (e), of a woman's right to dower (f), and of the estates and interests of mortgagors and mortgagees (g) have been before considered.

Husband's, wife's, mortgagors and mortgagee's interests.

The interest of a reversioner during the life of the tenant for life may be sold (h).

Reversions.

A vested remainder was, even prior to the statute 14 & 15 Vic. ch. 73 (i), allowing sales of future interests, saleable under execution (k).

Remainders.

Prior to this statute also, a right of entry was not saleable under execution; that is, where some person was in

Rights of entry.

(a) See the mode and effect of sale fully considered, post, chapter on mortgages.

(b) *Simpson v. Smyth*, 1 Err. & App. Rep. U. C. 44; *Doe d. Simpson v. Privat*, 5 Q. B. U. C. 215; see also *Doe d. Jarvis v. Cumming*, 4 Q. B. U. C. 390; *McLean v. Fisher*, 14 Q. B. U. C. 617. *Doe d. Hull v. Greenhill*, 4 B. & Ald. 684; 2 Wms. Saund., 11 a. n. 17.

(c) *Scott v. Scholey*, 8. East, 467; 2 Wms. Saund., 11 a. n. l.; but see *Doe d. Phillips v. Evans*, 1 C. & M. 450, per Bayley, J.

(d) *Doe d. Laurason, v. Canada Company*, 6 Q. B. O. S. U. C. 428.

(e) Ante pp. 273, 70, 71, 69, n. c.

(f) Ante pp. 69, n. c. 70.

(g). Post, chap. on Mortgages.

(h) *Doe d. Cameron v. Robinson*, 7 Q. B. U. C. 335.

(i) Con. Stat. ch. 90.

(k) *Lundy v. Maloney*, 11 C. P. U. C. 143.

Rights of
entry.

possession of the land claiming the land as his own adversely to the true owner, the interest or right of entry of such dispossessed owner was not saleable under execution; this was on the principle that as the owner could not himself by deed or otherwise convey his interest, but must first gain possession (a), so neither could a transfer of such interest take place through the instrumentality of the sheriff (b).

Contingent
interests.

At common law also, contingent interests could not be effectually conveyed by deed, (c), though under circumstances they were upheld in equity (d); and not being capable of effectual conveyance by deed, they were not liable to exe-

Binding effect
given by St.
to judgments
and execution
on various in-
terests.

cution, nor bound by any judgment. The inability of the common law to reach by judgment and execution many species of interests, as rights of entry, contingent remainders, &c., caused the interference of the Legislature, and

9 Vic. ch 34,
as to registry
of judgments.

their action on this is as follows:—By statute 9 Vic. ch. 34 (e), judgments registered in pursuance of the act were to bind all the lands within the county in which registered in like manner as the docketing of judgments in England then bound lands; this was an unfortunate reference by the Legislature, because at that time the practice of docketing had been discontinued in England by statute for some time, and no longer existed, being superseded by another mode. In one case here it became necessary to decide what the Legislature meant, and whether lands were bound at all under the act by registry; and the court held they were, and that the statute must be read as though it were expressed that registry should bind in like manner as docketing, "when docketing was in force in England." The Legislature by 13 & 14 Vic., ch. 63 (f) corrected the statute 9 Vic. ch. 34, by referring expressly to the effect of docketing before it was discontinued.

13 & 14 Vic.
ch. 63, Con.
St. ch. 89.

By these statutes therefore, lands could be bound by the effect of registry from the time of such registry, whilst theretofore (at law at least for the purpose of execution and

(a) Ante, p. 73. (b) *Doe d. Ausman v. Minthorne*, 3 Q. B. U. C. 423.

(c) Ante, p. 75.

(d) Ante, p. 76.

(e) Con. Stat. ch. 89, ss. 48, 49.

(f) Con. Stat. ch. 89, s. 49.

assuming that the writ of *elegit* was not in force,) the lands were only bound from the delivery of the writ of *fi. fa.* against lands to the sheriff, which could not take place till a return of the writ against goods. It was not only in respect of the power to bind lands before the delivery of the writ to the sheriff that the statute 13 & 14 Vic. conferred a benefit, but that statute went beyond the statute 12 Vic. and allowed the judgment the widest effect in binding every species of interest of the judgment debtor, "over which he had any disposing power which he might, without the assent of any other person, exercise for his own benefit."

The advantage creditors gained by these statutes may be shewn by reference to one or two cases. As before mentioned, there are many interests not bound by an execution, which were bound by registry of the judgment (*a*); it has been shewn that the interests of a mortgagee, and of a *cestui que trust*, (unless in case of a pure and simple trust,) were not bound, and could not in any way be reached at law; so also if an estate were limited to a man and his heirs to such uses as he should appoint, and in default of, and till such appointment to him in fee, such an interest might not be saleable under execution, because the subsequent exercise of the power of appointment in fee would override the execution; the appointee being deemed to take, not from the appointor under the appointment as from that time, but under the original conveyance, as though he were a party to whom the use in fee was by it originally limited (*b*). Such interests and power however, would have been bound under the statute 13 & 14 Vic. That act was copied from the Imp. Act 1 & 2 Vic. ch. 110. It will be observed it gave the courts of common law no greater scope than they had before: an interest not saleable under execution before the statute was not saleable after it, though bound, and the course was to proceed in equity on the lien.

Advantage of these statutes to creditors.

Exercise of power of appointment may defeat executions.

(a) *Ferrie v. Kelly*, 9 Grant, 262.

(b) See ante p. 233; *Wms. Rl. Prop.* 8 ed. p. 255; *Doe d. Wigan v. Jones*, 10 B. & C. 459.

It was by the statute 12 Vic. ch. 71 that the common law courts got extended powers under executions. This statute however, was in its main provisions repealed by 90, ss. 5, 11, 14 & 15 Vic. ch. 7, under which "a contingent, an executory, and a future interest, and a possibility coupled with an interest in any land, whether the object of the gift or limitation be or be not ascertained, also a right of entry whether immediate or future, vested or contingent, may be disposed of by deed;" and are liable to seizure and sale under execution. The effect of the provisions of these statutes, consolidated by ch. 90, ss. 5, 11, have been before considered, and the interests that are saleable thereunder (a).

Effect of judgment as a lien abolished by 24 Vic. ch. 41. The power to bind lands by registry of the judgment is taken away by 24 Vic. ch. 41. In England such power still continues, but when in English cases and books registry of a judgment is referred to, it is not registry in a county registry office, but registry as named in the Imperial Act in the Court of Common Pleas. The result of taking away the power to bind such interest in lands of a judgment debtor over which he has any disposing power which he could exercise of his own sole authority is that there are, as above mentioned, many interests in lands which are not bound at all by a judgment, nor except so far as the Stat. 14 & 15 Vic., Con. Stat. ch. 90, extends can they be reached at law, at least under an execution.

Equitable interests may be reached in equity. In equity, however, after execution issued, many interests which cannot be reached at law can be made available to satisfy the judgment creditor (b). Proceedings however must be taken in equity during the currency of the writ (c); though if a decree be obtained during the currency the subsequent lapse of the writ will not prejudice (d).

(a) Ante p. 65.

(b) Neate v. Duke of Marlborough, 3 M. & C. 407; Bank B.N. America v. Matthews, 8 Grant, 486; Moore v. Clark, 11 Grant, 497; Toms v. Peck, 12 Grant, 345; Yale v. Totterton, 13 Grant, 302; Wilson v. Proudfoot, 15 Grant, 103; Gilbert v. Jarvis now in appeal; and Horsley v. Cox, L. R. 4 Cha. App. 92.

(c) Wilson v. Proudfoot, supra.

(d) Yale v. Totterton, supra.

As between parties seeking to enforce their claims in equity on executions issued affecting the equitable interest of the defendant, the executions bind and take priority according to their delivery to the sheriff, and not according to the time that any one of them should first file a bill to enforce the lien (a). It was before mentioned that probably the interest of a *cestui que trust* if of a pure and simple nature is saleable at law under the Statute of Frauds, except in chattels (b).

(a) *Moore v. Clark*, 11 Grant, 497, *supra*. (b) *Ante*, p. 315.

There are certain questions which have been much agitated in our Relation of courts, and on which there has been much conflict of authority; they execution to are yet of importance on investigation of titles, but as by lapse of time, registered since registry of judgment has been abolished, they have not the im-judgment, portance they heretofore had, the result of the cases will be only stated priority, &c. as governed by the Statutes 14 & 15 Vic. and 24 Vic.: 1st. A writ related back to the registry of the judgment on which it was founded, so as to avoid an intermediate execution or conveyance by the execution debtor, and that before and after the Stat. 24 Vic. ch. 41 (*Doe v. Fanning*, 8 Q. B. U. C. 166; *Doe d. Dempsey v. Boulton*, 9 Q. B. U. C. 532; *Bank of Montreal v. Thompson*, 9 Grant 51, 3 Err. & App. Rep. 239 S. C.) 2nd. If such writ was not delivered to the sheriff within a year from entry of the judgment, it could not relate back as against another execution first delivered to the sheriff; and it makes no difference in this whether the last named execution was or was not on a registered judgment, or whether being on a registered judgment, it was or was not delivered to the sheriff within a year from entry, and this was so both before and after the Stat. 24 Vic. (*Rowe v. Jarvis*, 13 C. P. U. C., 495, and cases there cited; *Moffatt v. March*, 3 Grant, 623, overruled). 3rd. An execution on an unregistered judgment will take priority over a prior registered judgment, if no execution on the registered judgment have been delivered to the sheriff within a year from entry of the judgment; that is, a sale under the execution will not be subject to the equitable charge created by the prior registered judgment (*Kerr v. Amsden*, 2 Err. & App. Rep. 446). 4th. That for writs to relate back to registry, they must by Stat. 24 Vic. have issued prior to 1st September, 1861. 5th. That statute gives to a registered judgment no greater efficacy or binding effect if *theretofore* prejudiced in any way, as by absence of re-registry within three years prior to the passing of the act, or neglect to deliver the writ within a year, than it had before. 6th. The statute gave to no writ any greater efficacy than it had before: thus, if the interest bound by the registry of judgment were an equitable, or other interest, as a mortgagee's, which could only be reached in equity and not as law under execution, the remedy of the plaintiff was still only in equity: and so far as regarded the giving priority of writs according to the respective times of registry of the judgments, it would seem that was law before the act. 7th. Registry of a judgment against personal representatives did not bind the lands of the deceased (*Hamilton v.*

How and when the writ can issue, and the effect of irregularities on sale under it.

How and when the *feri facias* against lands may issue, and the effect of the irregularities in the mode of procedure has now to be considered.

Two statutes since the Con. Stat. bear on the subject, and it will be convenient to treat of them, and the decisions under them in their order.

Con. St. ch. 22, s. 252.

By Con. Stat. ch. 22, s. 252, goods and lands were not to be included in the same writ, nor could execution issue against lands till the return of a writ against goods, nor could the sheriff expose the lands to sale within less than twelve months from the day on which the writ was delivered to him. It was probably intended by the Stat. 5. Geo. 2, that lands and goods should be included in one writ (a); but not only was that forbidden by the Con. Stat., but the issuing and delivery to the sheriff of an *alias* writ against goods, and a concurrent writ against lands was held to be irregular; but it would seem that if neither had been acted on, either could probably be abandoned to support proceedings under the other (b): if, however, either have been acted on, then as against the defendant without his consent, and as against third parties claiming against the other writ, the proceedings had under the one writ cannot be abandoned, so as to support subsequent proceedings under the other writ (c). It would seem that third persons having an interest in the property, and being prejudiced

(a) Per A. Wilson, J., *Ontario Bank v. Kerby*, 16 C. P. U. C. 42.

(b) *Ontario Bank v. Kerby*, supra; see also cases next note.

(c) *Paton v. Ontario Bank*, 12 Grant 366, 13 Grant 107; *Ontario Bank v. Kerby*, supra; but see *Ontario Bank v. Muirhead*, 24 Q. B. U. C. 563.

Beardmore, 7 Grant, 286; *Bank of Montreal v. Taylor*, 15 C. P. U. C. 107). There remains yet for consideration the case of contest between an execution creditor on a registered judgment, and a purchaser from the execution debtor. Judgments by 9th Vic. ch. 34, were made to bind lands of a judgment debtor from registry, and if after registry the debtor conveyed, the grantee took subject to the judgment; but this act gave no priority to a judgment over a conveyance (though unregistered) from the debtor, *prior* to the judgment: this was done by 13 & 14 Vic. ch. 63, Con. Stat., ch. 89, s. 53, by which a conveyance *prior* to the judgment is declared void against the judgment, if registered before the conveyance. The statute, it has been held, only applies to render void, conveyances *prior* to the judgment, not those *subsequent*, even though the judgment were first registered (*Thirkell v. Patterson*, 18 Q. B. U. C. 75).

by the irregular proceedings, can apply against the writ on which they are had, as for instance, a purchaser or mortgagee (a). As a general rule also a seizure is a satisfaction *pro tanto* (b).

By ss. 5 and 6, of 29 & 30 Vic. ch. 42, no execution against lands could issue to any sheriff till after a return of *nulla bona* by the same sheriff, nor could he make any such return till the whole of the goods in his county were exhausted, and the return was to be in the order of priority on which writs came into his hands. The latter part of this enactment placed both the sheriff and a second execution creditors desiring a return with a view to proceed against lands in a very difficult position, when the first execution creditor insisted on his right to renew and to take no return (c).

Sec. 252 of the Con. Stat., and ss. 5 and 6 of 29 & 30 Vic. ch. 42. were repealed by 31 Vic. ch. 25, which is as follows :—

31 VIC. CH. 25.

AN ACT AS TO EXECUTIONS AGAINST GOODS AND LANDS.

Assented to 4th March, 1868.

Whereas, by an Act passed in the session of Parliament Preamble. held in the twenty-ninth and thirtieth years of Her Majesty's reign, chapter forty-two, intituled "An Act to amend the Common Law Procedure Act of Upper Canada," the principle is recognised of allowing persons who have priority executions in regard to goods, to retain the same in regard to lands ; but difficulties exist in applying the said Act by reason of its enactment that the Sheriff shall return writs against goods only in the order of pri-

(a) *Paton v. Ontario Bank*, 13 Grant, 107, 12 Grant, 366, s. c. ; *Ontario Bank v. Kerby*, 16 C. P. U. C. 40. per A. Wilson, J. ; but see also *Ontario Bank v. Muirhead*, 24 Q. B. U. C. 563.

(b) *Chit. Arch.* P. 12th ed. 681.

(c) *Gleason v. Gleason*, 4 *Prac. Rep.* 117.

ority in which they come to his hands, whilst, nevertheless, a person having a first execution against goods is entitled to renew the same indefinitely without any return thereof : Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of Ontario, enacts as follows :

29 & 30 Vic.
ch. 42, ss. 5 &
6, and s. 252,
C. L. P. Act
repealed.

Writs against
Lands may
issue at same
time as writs
against goods.

Proviso :
lands not to
be sold within
a year.

No sale of
lands until re-
turn of *nulla*
bona against
goods.

When *nulla*
bona not to be
returned.

If the debt is
realized under
writ against
goods, no ex-
penses allow-
ed against
lands.

Writs to have
same binding
effect as here-
tofore.

Proviso to s. 1.

1. Sections five and six of the said Act, and the two hundred and fifty-second section of the Common Law Procedure Act, are hereby repealed and the following substituted therefor :

" Any person who now is or hereafter may become entitled to issue a writ of execution against goods and chattels may, at or after the time of issuing the same, issue a writ of execution against the lands and tenements of the person liable, and deliver the same to the Sheriff to whom the writ against goods is directed, at or after the time of delivery to him of the writ against goods, and either before or after any return thereof : Provided, always, that the Sheriff shall not expose the lands for sale, or sell within less than twelve months from the day on which the writ against the lands is delivered to him."

2. No sale shall be had under any execution against lands until after a return of *nulla bona*, in whole or in part, with respect to an execution against goods in the same suit or matter by the same Sheriff.

3. No Sheriff shall make any return of *nulla bona*, either in whole or in part, to any writ against goods until the whole of the goods of the execution debtor in his county have been exhausted.

4. If the amount authorized to be made and levied under the writ against goods be made and levied thereunder, the person issuing the writ against lands shall not be entitled to the expenses thereof, or of any seizure or advertisement thereunder ; and the return to be made by the Sheriff to the writ against lands shall be to the effect that the amount has been so made, and levied, as aforesaid.

5. The said writs against lands and goods shall have the same operation and binding effect as heretofore, and the law applicable heretofore on executions shall continue applicable, except so far as variance is requisite, by reason of the enactments hereof.

It has been held under the old practice when writs were returnable on a day certain that an *alias fi. fa.* need not

have a year between the teste and the return day (a); and therefore under the present practice, where the *fi. fa.* has been twelve months in the sheriff's hands, he can sell under an *alias* writ, without waiting for the expiry of a further term of twelve months (b). Although this decision was prior to the Act of 31 Vic., it is apprehended that act makes no change, the language being the same as in the former act, with an immaterial exception. It would seem also that if lands be acquired by a defendant pending the writ, sale can be had of them within less than twelve months from acquisition, if the time required for due advertisement be allowed (c).

Cases wherein 12 months need not elapse before sale.

As regards sec. 3 of 31 Vic. ch. 25, the law was much to that effect under the Con. Stat. even (d). Any person it would seem, who is interested in the lands and prejudiced by non-compliance with this section, as for instance a purchaser or mortgagee, might apply against a *fi. fa.* lands irregular by reason of non-compliance with this section (e). It is apprehended however, that non-compliance with it would be a mere irregularity, and also that if a return of *nulla bona* though false, were *bona fide* without knowledge by the sheriff or the execution creditor of there being any goods, and after reasonable enquiries made, that such return would sufficiently comply with the spirit of this section (f). Moreover this section as regards its effect on sec. 2, would appear to be merely directory.

Section 3

Who may complain of non-compliance with.

Effect of false return of *nulla bona*.

The sheriff cannot under the writ, dispossess the occupant (g); and therefore the purchaser may have to bring ejectment to gain possession. In such an action, if it be against the defendant in the original suit, or any one claiming under him, subsequent to the delivery of the writ, the purchaser, even though he were the execution creditor, need not prove

Sheriff cannot dispossess defendant.

On ejectment by purchaser, proof required.

(a) Nickall v. Crawford, Taylor's Repts. U. C. 277.

(b) Campbell v. Delihanty, 24 Q. B. U. C. 236.

(c) Ruttan v. Levisconte, 16 Q. B. U. C. 495.

(d) Ontario Bank v. Kerby, 16 C. P. U. C. 35; Ontario Bank v. Muirhead, 24 Q. B. U. C. 563.

(e) See p. 321, n. a.

(f) Ontario Bank v. Kerby, same v. Muirhead, supra

(g) Doe d. Tiffany v. Miller, 10 Q. B. U. C. per Burns J., pp. 80, 81; ante p. 308.

In ejectment
by purchaser,
proof re-
quired.

How far ir-
regularities
affect a pur-
chaser.

the judgment under which the writ issued (a); nor it would seem, the proceedings requisite to the validity of the issuing the writ, as that the *fi. fa.* goods issued within a year, or that it was returned "No goods" (b); but if the defendant in the ejectment be a stranger, not claiming under or in privity with the execution defendant, then the judgment must be shewn, and the issuing and return of the writ against goods (c). Even though the judgment or the writs when produced should be irregular, or appear to be improperly issued, and such as would have been set aside on proper motion for that purpose, still it would not follow that therefore a purchaser would lose the benefit of his purchase; in many cases the purchase has been upheld under irregular proceedings, where the writ under which the sale took place was valid on its face, and the prior proceedings, or the absence of them, not such as to make the writ absolutely void (d): but in one case, Sir J. Robinson, C. J., observed, "there may be defects in a title under a sheriff's sale which when proved would not be fatal to the title, if a *stranger* had been the purchaser, but which could be urged with success against the *plaintiff* in the *fi. fa.* if he became the purchaser, because the irregularities might be such as he could be clearly held responsible for" (e): this distinction however, did not prevail in a recent case (f), wherein the purchaser was both execution creditor and attorney for a co-plaintiff, but the dictum of the learned Chief Justice was not referred to in that case.

(a) See generally *Roe v. McNeill*, 13 C. P. U. C. 189; remarked on in 14 C. P. U. C. 424 S. C. See also *Ralston v. Hughson*, 17 C. P. U. C. 364.

(b) *Delisle v. Dewitt*, 18 Q. B. U. C. 155; *Douglass v. Bradford*, 3 C. P. U. C. 459; *Mitchell v. Greenwood*, 3 C. P. U. C. 465.

(c) *Perry v. Piquott*, 12 Q. B. U. C. 372; *McDonell v. McDonell*, 9 Q. B. U. C. 259.

(d) *Doe d. Boulton v. Fergusson*, 5 Q. B. U. C. 515; *Doe d. Meyers v. Meyers*, 9 Q. B. U. C. 465; *Doe d. Spafford v. Brown*, 3 Q. B. U. C. O. S. 90; *Doe d. Hagerman v. Strong*, 4 Q. B. U. C. 510; *Ontario Bank v. Kerby*, 16 C. P. U. C. 35; 24 Q. B. U. C. 563; *Fields v. Livingston*, 17 C. P. U. C. 15; *Paterson v. Todd*, 24 Q. B. U. C. 296, in which cases see also what are irregularities.

(e) *Delisle v. Dewitt*, 18 Q. B. U. C. 158.

(f) *Paterson v. Todd*, 24 Q. B. U. C. 301.

Amendment of merely irregular proceedings can be had, Amendment.
even after error brought, on sale and conveyance by the
sheriff (a).

As regards those proceedings within the cognizance of Recitals in
the sheriff, as the time of delivery of the writ to him, the Sheriff's deed
seizure, and sale, the statement in his deed, of conveyance *prima facie*
to the purchaser in relation to such matters is *prima facie* evidence of
evidence (b): but a misrecital in the conveyance as to facts, certain mat-
ters.
which if they had happened only as recited, would invali-
date the sale, does not necessarily preclude the grantee from
shewing the truth, and from supporting the sale by evidence
contrary to the deed: thus, where the sheriff mis-recited
that by a *ven ex* he had seized, it was held that evidence
might be given that in fact the seizure was made under the
prior *fi fa* (c).

Renewal of writs under sec. 249 of the C. L. P. Act could Renewal.
only take place once (d). This was remedied by sec. 2 of
27 Vic. ch. 13, which is prospective only in its effect, at 27 Vic. ch. 13,
least as regards that section (e). A lapse of fifteen days s 2.
between the receipt of the writ by the attorney for the pur-
pose of renewal, and its re-delivery to the sheriff renewed,
has been held not to amount to an abandonment of prior
right under the writ, though a year had expired between
the issuing the writ and the re-delivery to the sheriff after
renewal (f).

Expiry of the writ takes place on the day next after Expiry.
that of issuing in the ensuing year (g).

If nothing be done by way of seizure or advertisement Seizure be-
during the currency of the writ, a sale under it will be fore, warrants
void (h), but if the sheriff have commenced the execution sale after ex-
piry.

(a) Doe d. Elmsley v. McKenzie, 9 Q. B. U. C. 559; Helm v. Cros-
sin, 17 C. P. U. C. 156. Con. St. ch. 22, s. 222, C. L. P. Act. Ch. Arch.
Pr. 12 ed. p. 642. (b) Mitchell v. Greenwood, 3 C. P. U. C. 465.

(c) Roe v. McNeil 14 C. P. U. C. 424.

(d) Miller v. Beaver Association, 14 C. P. U. C. 399.

(e) Miller v. Beaver Association, *supra*.

(f) Meneilly v. McKenzie, 3 Err. & App. Rep. 209.

(g) Bank of Montreal v. Taylor, 15 C. P. U. C. 107.

(h) Doe d. Greenshields v. Garrow, 5 Q. B. U. C. 237; Gardiner v.
Juson, 2 Err. & 2 App. Rep. 188.

Ven ex., when of the writ during its currency, as by advertisement, even required. though only under another writ, then a sale may be had under it after it has expired (a); nor is there any necessity in such case for a *ven ex*, which is only requisite to compel the sheriff to sell, and as his warrant for so doing, for he would not be justified to in selling under a *fi fa* at a great sacrifice.

Seizure, what is. An advertisement in the *Gazette* or seizure under one writ is a seizure under all writs then in the sheriff's hands (b).

What constitutes a seizure or inception of execution apart from advertising in the *Gazette* is by no means clear, especially since a recent decision (c). It had been considered that the fact of the sheriff going to the defendant (then residing on the lands in question) and asking him for a list of the lands to be sold under execution, and receiving the information which did not include the lands in question, which the sheriff was aware belonged to the defendant, and which he afterwards off the land added to the list himself, was sufficient before the C. L. P. Act (d). In those cases also are dicta that an advertisement or other acts would be sufficient, and if that be law which was so considered in those cases, then on principle, and in reason it would seem that an advertisement in a local paper only would be sufficient, as being an act of greater notoriety than what was deemed sufficient in those cases, or than an advertisement in the *Gazette*. It is somewhat remarkable therefor that it should have been held that an advertisement in a local paper was not sufficient (e), and that such decision should have been based on a case (f) as having decided the question, which would appear to have decided merely that

(a) Doe d. Campbell v. Hamilton, E. T., 3 Vic. R. & H. Dig. 403; Campbell v. Clench, 1 Q. B. U. C. 267; Doe d. Miller v. Tiffany, 5 Q. B. U. C. 79; Doe d. Tiffany v. Millar, 10 Q. B. U. C. 65; Kowe v. Jarvis, 13 C. P. U. C. 495; Hall v. Goslee, 15 C. P. U. C. 101.

(b) Hall v. Goslee, *supra*. (c) Hazlitt v. Hall, 24 Q. B. U. C. 484.

(d) Doe d. Miller v. Tiffany; Doe d. Tiffany v. Miller, *supra*, 6 Q. B. U. C. 426, S. C.; see also, Douglass v. Bradford, 3 C. P. U. C. 459.

(e) Hazlitt v. Hall, *supra*.

(f) Bank of Montreal v. Munro, 23 Q. B. U. C. 414.

a stayed writ had lost priority. The C. L. P. Act, Con. Stat. ch. 22, s. 268, does not enact that what was sufficient before the act should not be sufficient thereafter, nor that advertisements in the Gazette should alone be sufficient; it provides by sec. 268:

268. The advertisement in the Official Gazette of any lands for sale under a Writ of Execution, during the currency of the Writ, (giving some reasonable definite description of the land in such advertisement) shall be deemed a sufficient commencement of the execution to enable the same to be completed by a sale and conveyance of the lands after the Writ has become returnable. 19 V. c. 43, s. 188.

Since the decision above referred to it may be doubtful whether an actual taking and continuing of possession, or anything short of advertisement in the *Gazette* would suffice.

By sec. 269, if a sheriff vacate his office before sale, his successor is to proceed on the writ, but if after sale, then the old sheriff may execute a conveyance of any lands sold by him while in office (a). Prior to this enactment, if a sheriff had commenced the execution of a writ, as by seizure or advertisement, and then gone out of office, he could notwithstanding have proceeded to a sale, and have executed the conveyance to the purchaser, and this even though he might have left office for some time (b).

A sale by the sheriff is within the Statute of Frauds, and therefore a conveyance is requisite as required by that statute, and it should be under the hand and seal of office of the sheriff (c).

So also a conveyance from the sheriff, was within the Consolidated Registry Act, and could by priority of re-

Con. Stat. c. 22, s. 268, as to seizure.

Sec. 269, sheriff vacating office.

Sale within the St. of Frauds,

and Registry Act.

(a) *Miller v. Stitt*, 17 C. P. U. C. 559.

(b) Per Draper, J., in *Burnham v. Daly*, 11 Q. B. U. C. 211; *Campbell v. Clench*, 1 Q. B. U. C. 267; *Doe d. Campbell v. Hamilton*, E. T. 3 Vic., R. & H. Dig. 403.

(c) Per Burns, J., *Doe d. Tiffany v. Miller*, 10 Q. B. U. C. 81; *Witham v. Smith*, 5 Grant 203; *Doe d. Hughes v. Jones*, 9 M. & W. 372; *Mingaye v. Corbett*, 14 C. P. U. C. 557.

Sheriff's sale
within Regis-
try Act.

gistry both defeat a prior conveyance unregistered, and be defeated by a subsequent conveyance first registered; thus, under the former Consolidated Registry Act, if a person should have bought from another, and have omitted to register the conveyance, and the land should have been sold to a *bona fide* purchaser under an execution against the vendor, and such purchaser should have registered the conveyance from the sheriff, he would gain priority over the former unregistered conveyance (a). Should the purchaser from the sheriff have omitted to register the conveyance to him, and the execution debtor conveyed to another *after* the execution of the conveyance from the sheriff, such latter conveyance would have been postponed, if the person buying from the execution debtor first registered (b): but it would seem that if such latter conveyance were *before* the execution of the deed from the sheriff, and after the delivery of the writ, it would not, though registered first, have taken priority over the sheriff's deed: thus in one case a purchaser bought at sheriff's sale under execution, in 1843, but the sheriff did not execute the conveyance till 1853; in 1852 the execution debtor conveyed to a second purchaser, who registered, and insisted on priority under the Registry Act; but it was held that the act did not apply in such case to enable a purchaser who became such after the sale by the sheriff, and before the conveyance from him to defeat such conveyance or sale, that the lapse of a day between the sale and conveyance would not enable a purchaser from the debtor to defeat the sheriff's sale, so neither would a lapse of ten years; the sheriff's deed related back, and the wording of the Registry Act was referred to, as enabling subsequent deeds to defeat prior deeds, not prior deeds to defeat subsequent ones, which latter was what the purchaser was contending for (c).

(a) *Doe d. Brennan v. O'Neill*, 4 Q. B. U. C. 8; *Waters v. Shade*, 2 Grant, 457; *Doe d. Hughes v. Jones*, 9 M. & W. 377, per Alderson, B.; *Thirkell v. Paterson*, 18 Q. B. U. C. 75.

(b) Per Draper, C. J.; *Bruyers v. Knox*, 8 C. P. U. C. 524: *Doe d. Hughes v. Jones*, 9 M. & W. 377, per Alderson, B.

(c) *Burnham v. Daly*, 11 Q. B. U. C. 211.

The terms of the present Registry Act, on the subject, 31 Vic. ch. 20, ss. 58, 59, are as follows :

58. Every deed made by a sheriff or other officer for arrears of taxes shall be registered within eighteen months after the sale by such sheriff or other officer ; and all deeds of lands sold under process issued from any of the courts of law or equity in Ontario, shall be registered within six months after the sale of such lands, otherwise the parties respectively claiming under any of such sales, shall not be deemed to have preserved their priority as against a purchaser in good faith who may have registered his deed prior to the registration of such deed from the sheriff or other officer.

59. All deeds for lands sold for taxes, or under process of law, before the passing of this act, shall be registered within one year after the passing of this act, otherwise the parties respectively claiming under any such sales shall not be deemed to have preserved their priority as against a purchaser in good faith who may have acquired priority of registration.

A purchaser having notice of a prior sale would not, it is apprehended, be a purchaser in good faith within the meaning of these sections, and thus the first unregistered vendee would not require the aid of a court of equity to relieve against the registered conveyance.

Prior to the act of 13 & 14 Vic. ch. 63, an unregistered conveyance was not liable to be defeated by a registered conveyance unless the title were a registered title (a); thus, an unregistered conveyance from the sheriff would not before that act have been defeated by a subsequent conveyance from the former owner first registered, unless some conveyance of the land had theretofore been on registry. Section 59 has no express exception in it to meet the law as it stood prior to 13 & 14 Vic.

Under certain circumstances, as misconduct of the sheriff, or fraud, a sale and conveyance by him may be set aside (b): whatever power a court of common law might have

(a) *Casey v. Jordan*, 5 Grant 467.

(b) *McGill v. McGlashan*, 6 Grant, 324.

Sale and conveyance may be set aside.

in such a case (a), still relief can be had more completely in equity (b): a court of common law from which the execution has issued has power at least to *stay* the conveyance after sale; but on motion for such purpose, the purchaser as well as the sheriff should be called on to shew cause. In many cases wherein the sheriff and execution creditor has shewn a disregard of the interest of the defendant, whose estate has consequently been sold at a sacrifice, courts of equity have interfered. Where the sheriff offered for sale the interest of the debtor in certain lands, whatever it might be, not stating what it was, although the means for ascertaining were convenient, and it was actually known to the execution creditor and partially known to the sheriff, the sale which was at an under value was set aside (c). A court of equity will also decline its assistance, as against fraudulent conveyances, in support of the claim of an execution creditor, a purchaser at sheriff's sale at much less than the value, though the price was lessened by the execution defendant having made the conveyance to defeat the the execution, and by its being outstanding; the proper course being for the creditor to apply to the court before sale (d). But in such case the sheriff's deed is not void, and the estate would pass at law (e).

Where land is sold under a *ven. ex.* mere inadequacy of price is not sufficient ground to avoid the sale (f).

Effect of staying the execution.

If on or after the delivery of the writ to the sheriff, he be instructed to wait, or not to proceed till another writ should come to his hands, then the writ is not deemed as in

(a) See *Bank U. C. v. Miller*, Hil. Term 3 Vic., R. & H. Dig. 404; *McGillis v. McDonald*, Easter Term, 3 Vic., R. & H. Dig. 404; *Bethune v. Corbett*, 18 Q. B. U. C. 511, 514, per Robinson, C. J.

(b) *McGill v. McGlashan*, 6 Grant, 324; *Campbell v. Smith*, 10 Grant, 206.

(c) *Fitzgibbon v. Duggan*, 11 Grant, 188. See also *Jones v. Jones*, 15 Grant, 40; *Beebe v. Beglar*, 6 More Indian appeals, 510; *Palmer's case*, 4 Rep. 74, and remarks in the chapter on mortgages as to sale of equities of redemption by the sheriff, and *McDonald v. Cameron*, 13 Grant, 84, in which latter case the whole matter of a sheriff's duty on sale is considered.

(d) *Kerr v. Bain*, 11 Grant, 423; *Chalmers v. Piggott*, 11 Grant, 478; *Wilson v. Shier*, 6 Grant, 630; *Malloch v. Plunkett*, 9 Grant, 564.

(e) Per Esten, V. C., *Malloch v. Plunkett*, *supra*.

(f) *Laing v. Matthews*, 14 Grant, 36.

the sheriff's hands to be executed, and is liable to be postponed to any subsequent writ delivered to him (a).

So also great delay unexplained in execution of a writ which might have been executed is evidence from which a jury may infer a stay, or a fraudulent connivance with the defendant sufficient to postpone the writ to one subsequent (b). A delay however, of fifteen days in re-delivery to the sheriff of a writ taken to be renewed will not be sufficient to postpone the writ, though before re-delivery a year has expired from the issuing (c).

There is a very general impression, among sheriffs at least, that no duty is cast on them by law on delivery of a writ against lands, to make any inquiries or ascertain what lands are liable to satisfy the writ; and that at any rate they can relieve themselves from any responsibility in that respect by asking the creditor or his attorney to point out lands. It is conceived that such is not the law; on the contrary, it has been decided that sheriffs are not relieved from making reasonable enquiries, and that "if sufficient evidence is given to shew that the sheriff had notice, though not coming from the execution creditor, that the debtor had lands liable to be taken in execution, or even to put him on enquiry, when by reasonable diligence he might ascertain the same fact, that the plaintiff has done enough to sustain that part of his case" on an action by him against the sheriff for not levying, and a false return of 'no lands' (d).

Writ of extent at suit of the Crown. Prior to 14 & 15 Vic. ch. 9, Con. Stat. ch. 5, debts by bond to the Crown, if taken pursuant to 33 Hen. 8, ch. 39, bound the lands of the debtor, from the time of the instrument: thus, if a bond were given to the Crown, to secure the faithful performance of an office, the lands were bound from the date of the bond, even though no default should happen till many years

Delay in executing.

Sheriff's duty to make inquiries for lands.

Prior to Con. Stat. ch. 5, lands of Crown (bond) debtors bound from date of the bond.

(a) *Foster v. Smith*, 13 Q. B. U. C. 243; *Bank v. Munro*, 23 Q. B. U. C. 414; *Trust and Loan Co. v. Cuthbert*, 13 Grant, 412.

(b) *Kerr et al. v. Kinsey*, 15 C. P. U. C. 531.

(c) *Meneilly v. McKenzie* 3 Err. & App. Rep. 209.

(d) *Hutchings v. Ruttan*, 6 C. P. U. C. 452.

afterwards, and though the debtor had aliened his lands to a purchaser before default.

Simple contract debts, &c.

By 13 Eliz. ch. 4, lands of Crown accountants bound.

Personalty.

Simple contract debts, and specialty debts not within the Statute of Hen. 8, do not seem to have bound the debtor's lands at common law, before they were recorded on a commission for that purpose, *unless they were due from known public officers and accountants of the Crown*, in which case they seem to have always bound the lands from the time the debt accrued. By the Stat. 13 Eliz. ch. 4, all lands which the class of persons therein named should have whilst they remained accountable to the Crown were bound from the time they first entered office or became accountable, and not merely from the time when the debt should accrue to the Crown, provided their receipts exceeded three hundred pounds sterling. Personal estate, including chattels real, was as against *bona fide* purchasers bound however only from commencement of process, both as to Crown accountants and specialty debtors (a). In case therefore, of debtors on bond to the Crown, as also of that class of persons within the Statute of Elizabeth, if they should, after the obligation in the one case, or after entering office or becoming accountable in the other, alien their lands, and twenty years should elapse during which the lands should have gone through many hands, and then default should be made to the Crown in accounting or otherwise, the Crown can avoid all mesne conveyances and incumbrances by the process of extent (b).

There were frequently great difficulties in ascertaining whether a vendor was in the position of having his lands bound to the Crown, and therefore by Stat. 14 & 15 Vic. ch. 9, Con. Stat. ch. 5, it was enacted as follows:

(a) 8. Rep. 171.

(b) As to Crown debts see 5 Jarm. Convey. by Sweet, pp. 64 f. 79; Butler Co. Litt. 209 a, 18 ed; Shelford Stats. 7 ed. 596 note; West on extent.

CON. STAT. CH. 5.

AN ACT RESPECTING THE REGISTRATION OF DEEDS AND INSTRUMENTS CREATING DEBTS TO THE CROWN.

Her Majesty, by and with the advice and consent of the By Con. Stat. Legislative Council and Assembly of Canada, enacts as follows : ch. 5, special-ty debts bind-

1. No deed, bond, contract or instrument, under seal, or of record, whereby any debt, obligation or duty is incurred or created to Her Majesty, shall be valid or sufficient to charge or effect any lands or any interest in lands, of the person executing the same or effected thereby, as against any subsequent purchaser or mortgagee for valuable consideration of the same lands from such person, or against any subsequent registered judgment on the same lands against such person, unless a copy of such deed, bond, contract or other instrument, certified by the proper Officer having the custody of the same, had been registered in the office of the Clerk of the Court of Queen's Bench in Toronto, before the execution of the deed, conveyance or agreement of such subsequent purchaser or mortgagee, or the registry of such subsequent judgment. 14, 15 V. c. 9, s. 1.

2. Upon production to such Clerk of a copy of any such deed, bond, contract or other instrument so certified as aforesaid, he shall enter and register the same in a book to be kept by him for that purpose, and after such registry all the lands of the person executing such deed, bond, contract or other instrument, shall be bound and charged thereby. 14, 15 V. c. 9, s. 2.

3. The Governor in Council may order that all or any lands bound by such deed, bond, contract or other instrument, shall be released from the charge created thereby, and upon the production of such order certified by the President or Clerk of the Executive Council, the Clerk of the Court of Queen's Bench shall enter and register the same in the said book as a release of the lands mentioned in the order, whereupon the lands shall be released accordingly. 14, 15 V. c. 9, s. 3.

4. The Clerk of the Court of Queen's Bench shall be entitled to demand from the person producing the same for registry, the sum of One Dollar, to be paid to the fee fund in the same manner as other fees are paid to such fund. 14, 15 V. c. 9, s. 4.

As the act speaks of *registered* judgment creditors, and as registration of judgments is now abolished, and a mere *Judgments not within s.1*

judgment is no lien on lands (a), it would seem that, in favor of the Crown, the first section at least will not apply for the benefit of judgment creditors.

How far unregistered bonds bind the obligor, his heirs and devisees, volunteers or purchasers under execution.

Another question may also arise under sec. 2, viz, whether an unregistered instrument has any binding effect even against the debtor and his heirs or devisees, or persons claiming under or through him as volunteers or purchasers under execution. The original act may be looked at to guide in the construction of the statute which consolidates it (b), but if there be a variance between the two the latter will prevail (c). The title of the original act is "An act to compel the registration of deeds and instruments creating debts to the Crown;" the preamble is, "whereas it is desirable that all deeds and instruments under seal or of record, whereby any debt, duty or obligation has been or may be created to Her Majesty or her successors, shall be registered in manner hereafter provided, *in order to bind the land of the parties executing or affected thereby.*" This language, coupled with the fact that the latter part of sec. 2 would be quite useless unless unregistered instruments be held not to be binding, affords strong argument in favor of that view.

This act does not apply to those whose lands are bound *virtute officii*; as the corresponding Imp. act 2 & 8 Vic. ch. 11, s. 8, does.

In one respect perhaps, the act hardly affords sufficient information to purchasers, because it only relates to instruments of which a copy can be registered, and as above mentioned, there are persons whose lands are bound, though they may not have given any instruments, viz, those whose lands are bound under the Stat. Eliz. *virtute officii*, and those who may owe debts on simple contract, if they were known public officers or accountants to the Crown.

The Imperial Statute 2 & 3 Vic. ch. 11, s. 8, expressly provides in reference to the Stat. 13 Eliz., that the name abode, title, &c., name of the office, and time of acceptance shall be registered.

29 Vic. ch. 28, s. 28, as to assets.

By the Act of 29 Vic. ch. 28, s. 28, before treated of, the Crown has no priority on administration of assets.

(a) Ante p. 312.

(b) Bank of Upper Canada v. Brough, 2 Err. & App. Rep. 101, per Draper, C. J.]

(c) Con. Stat. ch. 1, s. 9.

Finally, bonds, covenants, or other securities to the Crown, entered into after 15th August, 1866, have no greater effect than between subjects by Stat. 29 & 30 Vic. ch. 43, which is as follows :

VIC. 29 & 30, CH. 43.

AN ACT TO AMEND THE LAW OF UPPER CANADA RELATING TO CROWN DEBTORS.

Assented to 15th August, 1866.

Whereas by law in Upper Canada, the property real and personal, of any person entering into any bond or covenant or being indebted to the Crown, is bound by such bond or covenant from the date thereof, and from the incurring of such debt ; and whereas it is desirable that such bonds, covenants and debts made or due by a subject to the Crown, should be placed on the same footing as if they were made or due from a subject to a subject Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :

1. No bond, covenant, or other security, hereafter to be made or entered into by any person to Her Majesty, her heirs or successors, or to any person on behalf of or in trust for Her Majesty, her heirs or successors, shall bind the real or personal property of such person so making and entering into such bond, covenant, or other security, to any further, other or greater extent than if such bond, covenant, or other security, had been made or entered into between subject and subject of Her Majesty.

Preamble.

Bonds, &c., to the Crown to bind only such property as would be bound in other cases.

2. The real or personal property of any debtor to Her Majesty, her heirs or successors, or to any person in trust for or on behalf of Her Majesty, her heirs or successors, for any debt hereafter contracted, shall be bound only to the same extent, and in the same manner as the real or personal property of any debtor where a debt is due from a subject of Her Majesty.

Property of Crown debtors bound only as if due to a subject.

3. The statute chapter five of the Consolidated Statutes for Upper Canada, shall be and the same is hereby repealed, except as to such securities as are mentioned in the first section of that statute, which had been made or entered into before the passing of this act.

Cap. 5 of Con. Stat. U. C. repealed.

Exception.

This act, by section 2 probably, would extend to those whose lands are, as above mentioned bound *virtute officii* under the act of 13 Eliz.

STATUTES.

- Con. Stat. c. 18, s. 10, and the English 'Bankruptcy Acts as to reputed ownership.
- “ c. 22, ss. 257, 258, 259, 260 as to sale under execution of the equity of redemption.
- “ c. 22, s. 261—Seizure of mortgage under execution.
- “ c. 73—Right of married woman to redemption moneys on mortgage to her.
- “ c. 83, s. 10—Mortgage by tenant in tail.
- “ c. 87—Release by executors—merger—purchase by mortgagee of the equity of redemption—
- “ c. 88, s. 19—As to arrears of interest.
- 24 Vic. c. 41, s. 6—Amending Consolidated Statute, chapter 87.
- 27 “ c. 13—Extending Con. Stat. c. 22 to heirs, executors and administrators of mortgagor.
- “ “ c. 15—Sale of lands on execution against executors and administrators.
- 27 & 28 Vic. c. 31—The act as to short form of mortgages
- 31 Vic. c. 20, ss. 60, 61, 62—Release of mortgage under the Registry Act.
- “ “ c. 20, ss. 66, 67, 68—Notice—Priority of registry as against equitable interests—Tacking—Consolidating.
- 32 “ c. 9—Release of mortgage by married woman.
- “ “ c. 10—Release by executors of mortgagee and power to assign redemption moneys and land.
- Imp. Stat. 14 Geo. 3., c. 78, s. 83—As to insurance moneys being laid out on the property.

It is proposed to treat of the above-named statutes in considering the various clauses of an ordinary mortgage, and at the same time to remark on other matters of most frequent occurrence, or of chief importance relating to mortgages.

In an ordinary mortgage in fee simple, following the habendum come, 1st, the proviso for redemption; 2nd,

the covenant for payment; 3rd, the covenants for title: certain special clauses are frequently introduced to furnish further security and remedy to the mortgagee, as, 4th, a covenant to insure and keep up insurance; 5th, a power of sale on default; 6th, an attornment clause, or a power of distress; 7th, provisions for reduction or increase of interest according to punctual payment; and lastly the provision for possession by the mortgagor till default.

The proviso for redemption is to the effect that if the mortgagor, his heirs, executors, administrators or assigns, pay the mortgagee, his executors, administrators or assigns the principal moneys and interest on certain days named, the conveyance shall be void; or as is the better mode, that the mortgagee, his heirs or assigns shall, at the cost and request of the mortgagor &c., re-convey to him, his heirs or assigns. Sometimes though rarely, a place and hour is named for payment; a provision that deposit to the credit of the mortgagee &c., in a specified bank, shall be a good payment, may well be inserted, and avoids the inconvenience of a personal legal tender to the mortgagee, which he can insist on if within the country.

The proviso for redemption.

The money should be made payable to the mortgagor and his personal representatives, not to the heirs; and though on death of the mortgagee the legal estate will descend to the latter, still by the act of 32 Vic. ch. 10, hereafter referred to, the former can on payment of the whole or any part, re-convey the whole or any part of the lands, or on any arrangement exonerate the whole or any part of the lands, without payment.

When the instrument is badly drawn, much difficulty may sometimes arise in those cases in which the redemption clause gives the right of redemption or of re-conveyance to those who would not be entitled to the estate if no mortgage had been made; in other words, the question is made to arise whether the beneficial interest in the property is changed by the proviso and vested in others. It not unfrequently happens that in a mortgage of the property of a married woman, the proviso is for redemption by or re-

Change in title of mortgagor by wording of proviso.

conveyance to, the husband and his heirs, and the question is whether this amounts to an alteration of the title to the equity of redemption. If the mortgage contain no other evidence of intention to transfer the equitable estate to the husband than a mere proviso as above, it would seem tolerably clear no such transfer would take place (a). It is when the instrument does contain some other evidence by recital or otherwise, not clear or conclusive, that the greatest difficulty arises. It may be stated generally that the indication of intention from which a change in the title, *ultra* the mortgage, is to be inferred, must be a strong one. On the one hand, the draughtsman who desires not only to draw a mortgage, but to change the course of title to the equity of redemption, should never omit to insert an appropriate recital, as the best evidence of intention to that effect; and on the other hand there is no need to apprehend that the title to the equity of redemption will be transferred, contrary to intention, by its being reserved to the mortgagor, his heirs, executors, administrators or assigns, when he is not owner in fee, or by any other mere want of accurate adaptation of the proviso for redemption to the state of the title (b).

On mortgage
by tenant in
tail for a free-
hold interest,
heirs *general*
entitled to
redeem.

The case of a mortgage by tenant in tail for any freehold interest (other than *pur autre vie*) is by Con. Stat. ch. 83, s. 10, as hereafter explained, an exception to the general rule that the beneficial interest results as of the old estate in the absence of evidence of intent to the contrary, for such a mortgage is a bar to the heirs in tail to the extent of the estate created, notwithstanding intention express or implied to the contrary. Thus on a mortgage in fee the equity of redemption will belong to the mortgagor not as tenant in tail but freed of the entail, and descend to heirs general instead of to the heirs in tail.

(a) Davidson on Conv. vol. 2, 528, 2nd ed. referring to *Whitbread v. Smith*, 3 De. G.M. & G. 727.

(b) Davidson on conveyancing *supra*; see further notes to *Earl of Huntingdon v. Countess of Huntingdon*, 2 W. & T. Lg. Ca. 928; *Jackson v. Innes*, 1 Bligh, 104.

If the proviso for redemption be that on payment on a day named the mortgage shall be *ipso facto* void, then in strictness no reconveyance to the mortgagor is requisite, though it would still be prudent to procure it, as otherwise evidence of the punctual payment must be preserved and given in order to shew that the legal estate is not outstanding in the mortgagee. Where the proviso is thus worded, and punctual payment is not made, or where the proviso is merely for re-conveyance, then of course that is requisite.

The provisions of the Registry Act, 31 Vic. ch. 20, as regards releases of mortgages are as follows :

60. When any registered mortgage shall have been satisfied, the registrar, on receiving a certificate executed by the mortgagee, or if the mortgage has been assigned and such assignment registered, then executed by such assignee, or by such other person as may be entitled by law to receive the money and to discharge such mortgage, in the form J, in the Appendix hereto, or to the like effect, executed in the presence of one witness, and duly proven by the oath of the subscribing witness thereto, in the same manner as herein is provided for the proof of other instruments effecting lands, shall register the same, and every affidavit attached thereto or endorsed thereon, at full length in its proper order, in the registry book, and numbering it in like manner as other instruments are required to be registered and numbered, and also by writing in the margin of the register wherein the said mortgage has been registered, words to the following effect :—" See certificate purporting to be discharge signed by _____, (*naming the person who has executed the same*)," and "see registry number _____ of such certificate Book (*stating the same according to the fact*)," and to which marginal entry the registrar or his deputy shall affix his name, and the same shall be deemed a discharge of such mortgage, and such certificate so registered shall be as valid and effectual in law as a release of such mortgage, and as a conveyance to the mortgagor, his heirs, executors, administrators or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor.

61. In case the mortgagee or any assignee of the mortgagee, desires to release or discharge part only of the lands contained in of part only

Reconvey-
ance, when
requisite.

Release under
Registry Act
31 Vic. ch. 20.

As to release

As to release
of part only.

Portion re-
leased to be
described.

Certificate of
payment, &c.,
to be valid, at
whatever time
given.

such mortgage, or to release or discharge only part of the money specified in the mortgage, he may do so by deed or by a certificate to be made, executed, proven and registered in the same manner as in cases where the whole lands and mortgage are wholly released and discharged; and such deed or certificate shall contain as precise a description of the portion of lands so released or discharged as would be necessary to be contained in an instrument of conveyance for registry under this act, and also a precise statement of the amount or particular sum or sums so released or discharged.

62. Every certificate of payment or discharge of the mortgage, or of the conditions therein, or of the lands or of any part of the same, or of any part of the money, by the mortgagee, or his assignee, his heirs, executors, administrators or assigns, or any one of them, at whatsoever time given, and whether before or after the time limited by the mortgage for payment or performance, shall be valid, if in conformity with this act, to all intents and purposes whatsoever, as herein mentioned.

FORM J.

Referred to in the 60th section of this Act.

To the Registrar of the County of

I , of , do certify that hath
satisfied all money due on, or to grow due on, (or hath satisfied
the sum of \$ mentioned in) a certain mortgage made by
of , to
which mortgage bears date the day of A.D. 18 ,
and was registered in the Registry Office for the County of ,
on day of , A.D. 18 , at minutes past
o'clock noon, in Liber for as
No. *(here mention the day and date of registration of
each assignment thereof, and the names of the parties—or men-
tion that such mortgage has not been assigned, as the fact may be)*
and that I am the person entitled by law to receive the money,
and that such mortgage, (or such sum of money as aforesaid, or
such part of the lands as is herein particularly described, that is
to say) is therefore discharged.

Witness my hand this day of A.D. 18

One Witness.

A. B.

Stating residence and occupation.

In considering hereafter the act of 32 Vic., ch. 10, the danger is pointed out of a mortgagee releasing part of the lands to the mortgagor with notice of sale by him of another part on which he has agreed to indemnify the vendee against the mortgage.

Danger of releasing part of the lands in certain cases.

It is to be observed that a release under the act will not operate as a re-conveyance till registered; till then it is but evidence of payment (a); nor will it apparently so operate unless the mortgage be registered, and if assigned, unless the assignment be registered. The form of release given by the act implies that such registration must precede the execution of the release. Assuming that it was expedient to deny efficacy to a discharge under the act unless the mortgage, and assignments, if any, are registered (which may be doubted), the act certainly gives unnecessary inconvenience in requiring the hour and minute and number of registry of the mortgage and all assignments to be set forth, for it frequently happens in practice that a discharge which would otherwise be executed, cannot be granted for the reason that the deeds are not forthcoming to furnish the information as to their registry, and payment and discharge both stand over till the registrar can be written to for the particulars. In this and other respects the act seems to be drawn more for the convenience of the registrars than of the public.

Release will not operate till registry, nor unless the mortgage and assignment, if any, be registered before execution of release.

Section 61 was unnecessary, the law was before this to the same effect as thus enacted as to a discharge under the act of part of the lands (b); and surely it required no special legislation to enjoin in case of part payment that the amount paid should be specified; or to give ability "to release or discharge part of the money;" or, when the intention was "to release or discharge part of the lands" to authorize the mortgagee "to do so by deed."

Sec. 61 of Registry Act unnecessary.

It is perhaps to be regretted that the Legislature had not simply authorized "such person as may be entitled by law

(a) *Lee v. Morrow*, 25 Q. B. U. C. 604; *Sidey v. Hardcastle*, 11 Q. B. U. C. 162, per Burns, J.

(b) *Re Ridout*, 2 C. P. U. C. 477.

Right to demand mortgage moneys without power to reconvey.

Con. Stat. 22, ss. 261, 262.

Action on discharge if releasor not entitled.

to receive the money," to give a discharge, instead of superadding to the above the words "and to discharge such mortgage." There may be persons authorized to receive the money and yet not authorized to give a discharge operating as a re-conveyance. An attorney in a suit to enforce payment of the mortgage money stands in this position, so also the sheriff who under Con. Stat. 22 ss. 261, 262 has seized a mortgage under execution against the mortgagor and enforced payment from the mortgagor. It would be reasonable that in such and similar cases the authority to receive should carry with it power to reconvey, and the principle has been recognized by the Legislature in giving power to executors to re-convey by the act of 32 Vic. ch. 10, presently referred to.

The discharge under the Registry Act does not contain the ordinary covenant against incumbrances which is universal on re-conveyance by deed; it may be added to the form, but unless sealed it will only operate as a mere assertion and not as a covenant. An action would however lie against the releasor on the assertion in the form given in the act, that he was entitled to receive the money, in case by his own act or wilful default he should not have been so entitled.

The Act of 32 Victoria provides as to certificates of discharge of mortgage as follows:—

32 VIC. CH. 9.

AN ACT TO AMEND THE REGISTRY ACT, AND TO FURTHER PROVIDE AS TO THE CERTIFICATES OF MARRIED WOMEN, TOUCHING THEIR CONSENT AS TO THE EXECUTION OF DEEDS OF CONVEYANCE.

Assented to 19th December, 1868.

Preamble.

Whereas it is desirable to amend the Registry Law of Ontario, so far as to give certainty to the right of married women jointly with their husbands to execute certificates of discharge of mortgage: Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. From and after the passing of this act, when any registered mortgage of lands wherein a married woman may happen to be a mortgagee therein, or whereof the assignee is a married woman, shall have been satisfied, the Registrar, on receiving a certificate, executed jointly by such married woman and her husband, in the form prescribed by the Registry Act of Ontario, shall register such certificate in the same manner provided by said act for registering certificates of discharge of mortgage, and such certificate shall be deemed a discharge of such mortgage to the same effect as any other certificates registered under the said act; and it shall not be necessary to produce any certificate of such married woman having been examined before any Judge or Justices of the Peace touching her consent therein in anywise; nor shall such examination be necessary.

How mortgages to married women may be discharged.

2. In case more than one married woman executes the same deed of conveyance mentioned and referred to in the second section of chapter eighty-five of the Consolidated Statutes of Upper Canada, the Judge or Justices of the Peace therein mentioned may include the examination and names of all or any number of such married women in one certificate in the form mentioned and set out in the said section as far as applicable.

One certificate may embrace several names.

Some of the former remarks as to releases under the Registry Act apply equally to this act.

Since the statute consolidated by Con. Stat. ch. 73, there can be but few cases wherein, when a married woman is entitled to mortgage moneys, she is not so entitled to her separate use under that statute. As far as the author is aware, it has not been usual in practice on obtaining from a married woman a certificate of discharge of mortgage, to require compliance with Con. Stat. ch. 85: and neither where the woman is entitled to the moneys to her separate use, nor even in the few and exceptional cases wherein she is not, would such compliance appear to have been requisite. Under Con. Stat. ch. 73, she is to "have, hold and enjoy" free from the control and disposition of her husband as fully as if unmarried. She would be competent to receive, and give a receipt, as a *feme sole*, for her moneys, and the form of discharge given by the registry

Sec. 1 unnecessary and injurious.

Its encroachment on the rights of married women to control their separate estate.

Con. St. ch. 90, s. 9, as to payment to surviving mortgagee, his executors, &c.

act is but a receipt in writing, though the act gives it when registered, and not till then, the effect of a re-conveyance. The receipt then works a reconveyance by operation of law, by force of the Registry Act; in itself it does not profess to convey. If the view of the author be correct, then the act has considerably encroached on the rights given to a married woman by Con. Stat. ch. 73, and practically placed the obtaining of her mortgage moneys under the control of her husband.

Con. Stat. ch. 90, s. 9, as to payment to the survivor of mortgagees, or the executors or administrators of the survivor their or his assigns is treated of in considering that statute.

32 VIC. CH. 10.

AN ACT TO MAKE BETTER PROVISION FOR THE DEALING BY EXECUTORS AND ADMINISTRATORS WITH MORTGAGES.

Assented to 19th December, 1868.

Whereas it is expedient to make better provision for the dealing by Executors and Administrators with Mortgages.

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Repeals Con. Stat. ch. 87, s. 5.

Executors may assign or release mortgage debt and the lands.

1. The fifth section of the act chaptered 87 of the Consolidated Statutes of Upper Canada is hereby repealed.

2. When any person entitled to any freehold land by way of mortgage has departed this life, and his executor or administrator has become entitled to the money secured by the mortgage, or has assented to a bequest thereof, or has assigned the mortgage debt, such executor or administrator, if the mortgage money was paid to the testator or intestate in his lifetime, or on payment of the principal money and interest due on the mortgage, or on receipt of the consideration money for the assignment, may convey, assign, release or discharge the mortgage debt and the legal estate in the land; and such executor or administrator shall have the same power as to any portion of the lands on payment of some part of the mortgage debt, or on any arrangement for exonerating the estate, or any part of the mortgaged lands without payment of money; and such conveyance, assignment, re-

lease or discharge shall be as effectual as if the same had been made by the person having the legal estate.

This act is taken from the repealed section of Con. Stat. ch. 87, which however, gave no power to assign the mortgaged lands. That statute was framed in part from the repealed Imperial Act of 7 & 8 Vic. ch. 76, s. 9, and the suggestions contained in the letter of Mr. Kerr regarding it (a). This act taken in part from former acts.

It frequently happened that a mortgagee died, and his personal representatives, or a legatee, became entitled to the mortgage moneys, whilst the legal estate descended to the heir-at-law in the absence of any disposition thereof by the mortgagee. The heir-at-law thus became trustee for the person entitled to the moneys, and on payment thereof was the party to reconvey. Con. Stat. ch. 87, s. 5, was intended to remedy this inconvenience, but it did not go far enough (b), for it would seem that whilst the statute contemplated the case of an assignment by the executor or administrator of the mortgage debt, it gave no power to assign the lands (c), though on payment to the assignee of the debt the executor or administrator might apparently reconvey the legal estate. Deficiency of former acts, gave no power to assign the land.

It would seem that the words "executor or administrator" are *nomina collectiva*, and that one of several personal representatives cannot release (d). One of several cannot release.

Where the mortgage money has been paid to a creditor who has seized the mortgage under execution against the mortgagee (e), or has garnished the debt, as also in one of the cases contemplated by the act, viz., payment made to the mortgagee himself, it might perhaps have been advisable to have made it compulsory on the personal representative to release, unless indeed the responsibility thus thrown on him might be deemed too great in such cases, As to the act being compulsory in respect of release in certain cases.

(a) See the letter in the appendix. (b) See Ker's letter in appendix.

(c) Robinson v. Byers, 9 Grant, 572; see however, per Draper, C. J., Hunter v. Farr, 23 Q. B. U. C. 328.

(d) McPhadden v. Bacon, 13 Grant, 591. (e) See post p. 359.

or the act as it is, could in a court of equity, be taken as compulsory.

The act does not warrant release of part when residue is not of sufficient value,

The power given by this section to release part of the land on payment of part of the debt in no way prevents the application of the rule, that personal representatives, or others occupying a fiduciary position, must in any such transaction proceed with due caution at their peril and see that the value of the security is not prejudiced by a release of part. It may be also where part of the security is released for a manifestly inadequate amount, and the remainder is not sufficient to answer the mortgage debt, that the executor or administrator so releasing would not only be personally responsible, but the release avoided as against the releasee and all claiming under the release with notice as a breach of trust (a).

nor a sale or release of part when releasor has notice of a prior sale of another part with an agreement by mortgagor to pay the mortgage,

So also where the mortgagor has sold part of the property, and agreed with the vendor to pay off the mortgage, if the mortgagee release the residue or join with the mortgagor in an absolute sale of it as free from the mortgage, with notice of the prior sale and agreement, and without the assent of the first vendee, the part so sold will be released from the mortgage; even though the mortgagee, and not the mortgagor, have received the proceeds of the second sale: and this will equally be so if the sale be under a decree in a suit by the mortgagee to which the first vendor is no party (b). The principle is that as between the mortgagor and the first vendee, the lands unsold become principally and solely liable, and as regards the mortgagee they are in the position of surety for the debt, who, having notice can do nothing to prejudice the right of the owner of lands first sold to have assigned to him on payment of the mortgage debt the lands so principally liable to him. But the mortgagee can sell under a power of sale in his mortgage, for the power is paramount to any right of the vendee. So also where a mortgagor sells part with an

but a mortgagee can still sell under a power in the mortgage,

(a) Davidson Convey. 2 ed. vol. 2, p. 710; Lewin on Trusts, 5 ed. p. 423

(b) Gowland v. Garbett, 13 Grant, 578; see also Guthrie v. Shields therein referred to.

agreement to pay off the mortgage, a release by the mortgagee to the vendee will not prejudice his security as against a purchaser of the equity of redemption who had notice of the prior sale (a).

or release to a purchaser as against a subsequent purchaser of the equity with notice.

The Con. Stat. ch. 87, ss. 1, 2, as amended by 24 Vic. ch. 41, may here be alluded to. These sections are as follows:

CON STAT. CH. 87, SECS. 1, 2 & 3.

1. Any mortgagee of freehold or leasehold property, or any assignee of such mortgagee, may take and receive from the mortgagor or his assignee, a release of the equity of redemption in such property, or may purchase the same under any power of sale in his mortgage, or any judgment or decree, without thereby merging the mortgage debt as against any subsequent mortgagee (or registered judgment creditor) having a charge on the same property, 14 & 15 Vic. ch. 45, s. 1.

Con. Stat. ch. 87, ss. 1 & 2. as to merger on release or purchase of equity of redemption.

2. In case any such prior mortgagee or his assignee, takes a release of the equity of redemption of the mortgagor or his assignee in such mortgaged property, or purchases the same under any power of sale in his mortgage, or any judgment or decree, no subsequent mortgagee or his assignee or registered judgment creditor, shall be entitled to foreclose or sell such property without redeeming or selling subject to the rights of such prior mortgagee or his assignee, in the same manner as if such prior mortgagee or his assignee had not acquired such equity of redemption 14 & 15 Vic. ch. 45, s. 2.

When prior mortgagee shall take release of equity of redemption, &c., subsequent mortgagees not entitled to purchase or sell property without redeeming &c.

3. This act shall not effect any priority or claim which any mortgagee or judgment creditor may have under the registry laws. 14 & 15 Vic. ch. 45, s. 3.

Priority under register act not to be affected.

By 24 Vic. ch. 41, sec. 6, the above sections are to be read and construed as if the words "or registered judgment creditor" and "or judgment creditor" were omitted therein.

24 Vic. ch. 41, s. 6 varies Con. St. ch. 87.

The Con. Stat. applied to prevent merger not only as against a mortgagee but also as against a registered judgment creditor, and if the act of 24 Vic. ch. 41, had no further affected the Con. Stat. than by abolishing registry of judgments, it is probable that the Con. Stat. would have

Con. St. ch. 87, as varied by 24 Vic. ch. 41, will not *per se* protect on merger as against execution creditor,

(a) Crawford v. Armour, 13 Grant, 576.

been construed to extend to execution creditors. The act of 24 Vic. s. 6, however enacted that the first and second sections of the Con. Stat. should "be read and construed as if the words or *registered judgment creditor* were omitted therein." The consequence is that the Con. Stat. will not *per se* protect a mortgagee buying the equity of redemption as against a mesne execution creditor. The question apart from the act is presently considered.

but mortgagee paying a prior charge is entitled to lien as against mesne incumbrances.

This act applies, not where equitable owner of the property becomes owner of the charge, but where owner of the charge acquires the absolute or equitable ownership in the property.

A mortgagee however, who as such pays off a prior charge to protect his title, is entitled to a lien for the amount as against mesne incumbrances (a).

The statute seems to apply where the owner of the charge, or mortgagee having the legal estate, acquires the absolute ownership of the property, not where the owner of the equity of redemption (who in equity is still regarded as substantially the owner of the property subject to the charges), acquires the charge (b). Cases under the latter head and the law of merger thereon, will probably more frequently occur on sale by the sheriff under the C. L. P. Act, where the equity of redemption should be sold subject to two mortgages, and the purchaser should pay off the first: decisions on which are hereafter referred to.

Other cases of non-application of the act.

The obscurity of the act has been severely commented on (c), and it has been said it "is not to be extended beyond its letter" (d). Thus it has been held not to apply to protect a registered judgment creditor who bought the equity of redemption at sheriff's sale, and subsequently got an assignment of the first mortgage as against a mesne incumbrance (e); nor to an equitable quasi-mortgagee, as a vendor retaining a lien for his purchase money, and subsequently acquiring the estate (f).

(a) *Trust & Loan Company v. Cuthbert*, 14 Grant, 410.

(b) See the distinction in the notes to *Forbes v. Moffatt*, Tud. Lg. Ca. 2 ed. 887.

(c) See *Watkins v. McKellar*, 7 Grant, 584, per Blake, C., and *Bank of Montreal v. Thomson*, 9 Grant, 58, per Esten, V. C.

(d) *Bank of Montreal v. Thomson*, 9 Grant, 58; see also, per Van Koughnet, C., in *Heward v. Wolfenden*, 14 Grant, 188.

(e) *Bank of Montreal v. Thomson*, *supra*; see also *McDonald v. Reynolds*, 14 Grant, 691.

(f) *Finlayson v. Mills*, 11 Grant, 221, per Spragge, V. C., in appendix.

These sections were passed to prevent the application of the law of merger on release of the equity of redemption to the mortgagee, under which the mortgage was regarded as extinct, and could no longer be set up as against subsequent incumbrances of which the purchaser of the equity of redemption had notice (*a*), who thus were let in to priority. As a general rule, a man cannot own an estate and also a charge on it, thus being at the same time debtor and creditor to himself, in such case, as a general rule, a merger of the charge takes place to avoid confusion of rights.

It has been said that, contrary to former decisions, "the course of judicial decision appears to have done the same thing, or nearly the same thing, in England, since the passing of our statute," as these sections (*b*). Recent cases establish that a mortgagee purchasing the interest of the mortgagor, may preserve his mortgage by evidence of express stipulation or clear intention to keep alive the mortgage (*c*): and the fact of its being to the interest of the purchaser to keep alive the mortgage, has been said to be a matter for consideration in determining the question of merger (*d*); and it would seem that where the mortgagee acquires the equity of redemption by devise or inheritance, evidence of intention and of interest are of more weight, and more readily govern to prevent merger than where he acquires it by contract and conveyance (*e*).

As before remarked, the statute does not apply as against an execution creditor, nor to the case of a purchaser of the equity of redemption paying off prior charges

Merger, how
avoided apart
from the act.

Statute does
not prevent
merger, where
purchaser of

(*a*) As to notice see the judgment of the Chief Justice in *Street v. Commercial Bank*, as referred to by Blake, C., in *Emmons v. Crooks*, 1 Grant, 166.

(*b*) *Finlayson v. Mills*, 11 Grant, 231, per Mowat, V. C., in appendix hereto; *Watts v. Syme*, 1 De. G. Mc. & G. 240; *Cooper v. Cartwright*, John. 686; see *Elliott v. Jayne*, 11 Grant, 415, per Spragge, V. C.

(*c*) See cases, *supra*, n. *b*.; *Forbes v. Moffatt*, Tud. Lg. Ca. 2 ed. 845, in notes; *Mayhew on Merger*, 119 et seq.; *Fisher on Mortgages*, 2 ed. 785, et seq.

(*d*) *Elliott v. Jayne*, 11 Grant, 414, per Spragge, V. C. post, p. 351 n. *b*.

(*e*) *Finlayson v. Mills*, *supra*, per Mowat, V. C.; *Emmons v. Crooks*, 1 Grant, 167, per Blake, C.

the equity
buys up a
charge,

Intention and
interest of
purchaser
govern.

Case of pur-
chaser of equi-
ty of redemp-
tion subject
to incumbran-
ces which
purchaser is
bound to his
vendor to pay
off; if paid
off will they
merge?

which it may be advisable to keep alive as against subsequent incumbrances (a). As to such charges so paid off, the priority of which it is desired to preserve, it has been said to be "good conveyancing to have them assigned to trustees, but it does not seem to be necessary" (b). The assignment should contain express declaration of intention to preserve the charge (c). Apart from any assignment it has been said to be "settled law that the purchaser of an estate may get in outstanding incumbrances without merging them, and that there shall be no merger if the owner of the estate manifests an intention to keep the incumbrances alive, and its being his interest that they should be kept alive is evidence of such being his intention (d)."

There is apparently some difficulty as to the law of merger where the second section of Con. Stat. ch. 87 does not apply, in regard to a charge paid off by a purchaser of the equity of redemption where there is no express stipulation as to keeping alive the charge, and his interest or intention to have such charge kept on foot, as against a mesne incumbrance, conflicts with his duty, or an implied obligation to the vendor of the equity of redemption who has also created the charge. Thus, where a man should buy an equity of redemption sold by the sheriff under Con. Stat. ch. 22, (C. L. P. Act) subject to two mortgages granted by the execution debtor, and should pay off the first, it would seem that having notice of both mortgages at the time of sale, he should not be entitled to set up the first mortgage as against the second mortgagee. Con. Stat. ch. 87, as before explained, does not apply in such case for the benefit of the equitable owner buying in the first mortgage. The purchaser is to be assumed "to pay so much less for the estates in consequence

(a) See *Bank of Montreal v. Thomson*, 9 Grant, 58, per Esten, V. C.

(b) *Elliott v. Jayne*, 11 Grant, 414, per Spragge, V. C.; see also *Beatty v. Gooderham*, 13, Grant, 320.

(c) *Davidson. Conv.* 2 ed. vol. 2, p. 249; *Fisher on Mortgage*, 2 ed. vol. 2, p. 793; *Beatty v. Gooderham*, 13 Grant, 317.

(d) *Elliot v. Jayne*, supra.

of the existence of the mortgages, and deemed therefore to undertake to discharge them both " (a). Moreover, Con. Stat. ch. 22, expressly throws on the purchaser the liability to pay the mortgages, and gives the mortgagor a remedy over against him in case the mortgagor should pay: if the second mortgagee sues the mortgagor on his covenant to pay, he in turn sues the purchaser of the equity of redemption for indemnity, which leads to some circuity of action. The position and interest of the mortgagor also has to be considered on the question of the merger (b). It would seem therefore, in such case that unless there be at the time of sale the assent of the mortgagor-vendor that his vendee shall be entitled to keep on foot the first mortgage, that it will be merged as against the mesne incumbrance of which the vendee of the equity of redemption had notice (c).

The case of *Finlayson v. Mills* on the construction of the act and the law of merger generally affords most useful information, and it will be found in the appendix to this treatise. General exposition of the law in *Finlayson v. Mills*.

The following remarks of the late Vice Chancellor Esten, *Blake v. Beatty* in delivering judgment in *Blake v. Beatty* (d) will also be of service. He says:—

" From these authorities we think the rule to be deduced is, that where the charge which has been satisfied is the proper debt of the party paying it, either by force of the original contract by which it was created, or in consequence of the purchase of the estate subject to it, and the stipulations accompanying such purchase, or any express or implied contract, making it his duty, as between him and the The right to keep paid off charges on foot.

(a) *Woodruff v. Mills*, 20 Q. B. U. C. 58, per Robinson, C. J.; *Thomson v. Wilkes*, 5 Grant, 594; see also *Bank of Montreal v. Thompson*, 9 Grant, 59, per Esten, V. C.

(b) *Finlayson v. Mills*, 11 Grant, 225, per Mowat, V. C., see appendix; *Emmons v. Crooks*, 1 Grant, 167, per Blake. C., ante p. 349 n. d.

(c) *McDonald v. Reynolds*, 14 Grant, 691; *Blake v. Beatty*, 5 Grant, 359; *Bank of Montreal v. Thomson*, 9 Grant, 59; *Emmons v. Crooks* 1 Grant, 167 per Blake, C.; *Woodruff v. Mills*, 20 Q. B. U. C. 51; but see *Elliot v. Jayne*, 11 Grant, 412, referring to *Watts v. Symes*, 1 DeG. M. & G. 240; see also *Beatty v. Gooderham*, 13 Grant, 317. (d) 5 Grant 359.

The right to keep paid off charges on foot.

person from whom he has purchased, to discharge it, he cannot keep it alive as a primary charge against any mesne incumbrances, which also it was imposed upon him by the terms, express or implied, of his contract of purchase to discharge; but if by the terms of his contract he was not bound to discharge the incumbrance in question, or although he was bound to discharge that, if he was not bound to discharge any mesne incumbrances affecting the same estate, it would be competent to him to maintain the incumbrance he has discharged as a subsisting charge, in the former case for his reimbursement, and as standing in the place of the incumbrancer, in the latter case, for his protection.

“A purchaser of an equity of redemption may also perhaps stipulate with his vendor, while he enters into an engagement to indemnify him against all the incumbrances effecting the estate, that he shall be at liberty to keep any incumbrance he may discharge on foot as against the subsequent incumbrances so as to make his bargain as beneficial as possible.

“In all these cases the principle seems to apply of *modus et conventio vincunt legem*, and the incumbrancers are simply not permitted to be damnified by the arrangement made between the contracting parties, which would be unjust; while at the same time no necessity exists for placing them in a better condition than that in which they would otherwise stand. They retain all the remedies they ever had, but acquire no new ones.”

Can a mortgagee buy under his power of sale?

On one important point it is believed there is some conflict of opinion among common law members of the profession; viz., whether apart from any question of merger, this statute does not warrant a mortgagee in buying himself under a power of sale in his mortgage, thereby virtually obtaining all the benefit and effect of a foreclosure in equity, and occupying at the same time the position both of vendor and vendee. This would be contrary to well established principles breaking in upon which is a strong argument against any interpretation of the statute which would allow it; still it must be confessed, there was room for question,

but it seems to have been decided that a mortgagee so buying will still continue mortgagee, and liable to be redeemed by the mortgagor on bill for redemption (a). Undoubtedly under Con Stat. ch. 22 s. 259, hereafter alluded to, a mortgagee may purchase for his own sole benefit the equity of redemption of his mortgagor at sheriff's sale, and *that* even on an execution in which he is plaintiff, but there the above rule is not offended, for the sheriff a public officer assumed to do his duty, intervenes between the parties, and he, not the mortgagee, conducts the sale, and (on a *fi. fa.* at least), cannot sell at a sacrifice, is compelled by statute to give adequate notice, and is bound to proceed with due regard to the interest of the debtor (b); moreover, the distinction above alluded to, where the sheriff intervenes, has been recognized in adjudged cases (c).

So far as this statute, ch. 87, enables a mortgagee to receive from the mortgagor a release of the equity of redemption, or purchase the same under any judgment, without merging the mortgage debt as against a subsequent mortgagee, there is not so much difficulty; for in the first place that does not offend against the rule that the mortgagee shall not sell to himself, and for the reasons above given; and next but for the statute the effect might be as above explained, to cause a merger of the legal, by its coalition with the equitable estate, and thus mesne incumbrances would stand first. But when a mortgagee sells under his power of sale, it is not the mere equity of redemption which he sells, but the *legal estate* in the lands, and the effect and object of the power is to enable him to sell such legal estate free from any equity of redemption. On any sale under the power, the purchaser need care nothing for incum-

(a) *Watkins v. McKellar*, 7 Grant, 584; see also post p. 377 as to circumstances under which the court will set aside a purchase by mortgagee of equity of redemption.

(b) *Henry v. Burness*, 8 Grant, 356; *Bethune v. Corbett*, 18 Q. B. U. C. 498; *McGill v. McGlashan*, 6 Grant, 324; see also ante pp. 329, 330.

(c) *Stratford v. Twynam*, *Jacobs*, 418; *McGill v. McGlashan*, 6 Grant, 324; *Mohawk Bank v. Atwater*, 2 Paige, 54; *Woods v. Monell*, 1 John. Chan. Ca., 502, *American*; see also *McKinnon v. McDonald*, 13 Grant, 162.

branches subsequent to registry of the mortgage, his title under the power will be paramount to any such (a) : and so by parity of reasoning, if the mortgagee were the purchaser (assuming he could sell the legal estate to himself), he would also take freed of the equity of redemption, and paramount to incumbrances subsequent to his mortgage : no question of merger in such a case would arise, for the mortgagee is not selling the equity of redemption, retaining the legal estate, but the latter, freed of the former, as authorized by the power. The statute seems to assume, that a mortgagee selling under his power of sale, can and sometimes does, sell the mere equity of redemption, and is based on that supposition ; for referring to it, it enacts that the mortgagee "may purchase the same": assuming even that under powers of sale as usually drawn such a sale could be had, it has never happened in practice, at least on behalf of a first mortgagee. Possibly the Legislature contemplated the case of a mortgagee, other than the first selling under the power of sale, in which case in one sense it would be a sale of an equity of redemption.

The Act may perhaps contemplate the case of sale by a second mortgagee.

St. 27 Vic. ch. 13, and Con. St. ch. 22, ss. 257, 258, 259, 260, sale by sheriff of equity of redemption. The provisions of the Con. Stat. ch. 22, C. L. P. Act, and the act of 27 Vic. ch. 13 amending it, as to sale by the sheriff under execution of the equity of redemption of the mortgagor, are as follows :

CON. STAT. CH. 22, SECS. 257, 258, 259, 260.

The interest of mortgagors may be sold in execution.

257. The sheriff or other officer to whom any writ of *facias* against the lands and tenements of any mortgagor of real estate is directed, may seize or take in execution, sell and convey, (in like manner as any other real estate might be seized or taken in execution, sold and conveyed) all the legal and equitable interest of such mortgagor in the mortgaged lands and tenements. 12 V. c. 73, s. 1.

Effect of such such sale.

258. The effect of such seizure or taking in execution, sale and conveyance, of any such mortgaged lands and tenements shall be to vest in the purchaser, his heirs and assigns, all the legal and

(a) *Daniels v. Davidson*, 9 Grant, 173, where a purchaser under a power of sale in a mortgage took paramount to a conveyance made prior even to the mortgage, but registered after its registration.

equitable interest, of, the mortgagor therein at the time the writ was placed in the hands of the sheriff or other officer to whom the same is directed as well as at the time of such sale, and to vest in such purchaser, his heirs and assigns, the same rights as such mortgagor would have had, if such sale had not taken place; and the purchaser, his heirs and assigns, may pay, remove or satisfy, any mortgage, charge, or lien, which at the time of such sale existed upon the lands or tenements so sold, in like manner as the mortgagor might have done, and thereupon the purchaser, his heirs and assigns shall acquire the same estate, right and title, as the mortgagor would have acquired, in case the payment, removal or satisfaction had been effected by the mortgagor, and on payment of the mortgage money to the mortgagee by the purchaser, his heirs or assigns, the mortgagee, his heirs or assigns shall, if required, give to such purchaser, his heirs or assigns, at his or their charge, a certificate of payment or satisfaction of such mortgage, which certificate may be in the following form, that is to say:

To the Registrar of the County of

I, A. B., of , do certify that C. D., of , who hath become the purchaser of the interest of E. F., of , hath satisfied all money due upon a certain mortgage made by the said E. F. to me, bearing date the day of , one thousand eight hundred and . and registered at of the clock in the forenoon (*as the case may be*) of the day of , in the same year (*or as the case may be*) and that such mortgage is therefore discharged. As witness my hand, this day of , one thousand eight hundred and

(Signed)

A. B.

E. H. of }
G. H. of } Witnesses.

And such certificate shall be of the like effect, and shall be acted upon by registrars and others to the same effect as if the same had been given to the mortgagor, his heirs, executors, administrators or assigns. 12 V. c. 73, s. 2.

259. Any mortgagee of lands and tenements so sold, or the heirs or assigns of such mortgagee, (being or not being plaintiff or defendant in the judgment whereon the writ of *fiери facias* under which such sale takes place has issued) may be the purchaser at such sale, and shall acquire the same estate, interest and

Mortgagee
may become
purchaser at
sheriff's sale.

rights thereby as any other purchaser; but in the event of the mortgagee becoming such purchaser, he shall give to the mortgagor a release of the mortgage debt, and if any other person becomes such purchaser, and if the mortgagee enforces payment of the mortgage debt against the mortgagor, then such purchaser shall repay the amount of such debt and interest to the mortgagor, and in default of payment thereof within one month after demand, the mortgagor may recover from such purchaser the amount of such debt and interest in an action for money had and received, and until such debt and interest have been repaid to the mortgagor, he shall have a charge therefor upon the mortgaged lands. 12 V. c. 73, s. 3.

The interest of a mortgagor in goods mortgaged may be sold in execution.

260. On any writ, precept or warrant of execution against goods and chattels, the sheriff or other officer to whom the same is directed, may seize and sell the interest or equity of redemption in any goods or chattels of the party against whom the writ has issued, and such sale shall convey whatever interest the mortgagor had in such goods and chattels at the time of the seizure. 20 V. c. 3, s. 11,—and see 12 V. c. 73, s. 1.

27 VIC. CH. 13, SECTION 1.

AN ACT TO AMEND THE COMMON LAW PROCEDURE ACT OF UPPER CANADA.

Assented to 15th October, 1863.

27 Vic. ch. 13. Whereas doubts have arisen as to the meaning of the two hundred and fifty-seventh, two hundred and fifty-eight, and two hundred and fifty-ninth sections of the Common Law Procedure Act, being the twenty-second chapter of the Consolidated Statutes of Upper Canada: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

How ss. 257, 258 of Con. Stat. ch. 22, shall be construed.

1. Whenever the word "mortgagor" occurs in the said sections, it shall be read and construed as if the words "his heirs, executors, administrators or assigns, or person having the equity of redemption" were inserted immediately after such word "mortgagor;" and the equity of redemption in any freehold mortgage of real estate shall be saleable under an execution at law against the lands and tenements of the owner of such equity of redemption in his lifetime, or in the hands of his executors or

administrators after his death, subject to such mortgage, in the same manner as any lands and tenements can now be sold under an execution at law.

Whether this section is retrospective in its operation admits of question (a). Retrospective?

It is by no means clear that the interest of a mortgagor in chattels real, as leasehold interests, can be sold (b). It would seem tolerably clear that at least under s. 257 of Con. Stat. ch. 22, it cannot be sold (c). Can mortgagor's interest in chattels real be sold?

Before the act of 27 Vic. ch. 13, it was held that the equity of redemption could not be sold under the prior act unless then vested in the mortgagor himself, and on an execution against him; if vested in an assignee it could not be sold under execution against him (d). It was also held that even on execution against the personal representatives of the mortgagor, the equity of redemption could not be sold though the mortgagor should have died entitled (e). Before 27 Vic. c. 13 equity of redemption could not be sold in suit against executors or assignee of mortgagor.

The equity of redemption in one or some only of several parcels of land mortgaged cannot be sold under this act, and therefore apparently no sale can be had at all where the lands lie in different counties (f): and it would seem to follow that the sheriff must offer all for sale in one lot; and on the same principle it would seem that where the equity of redemption is severed by conveyance by the mortgagor of part of the lands mortgaged before delivery of the writ, no sale can be had; nor where, before delivery of the writ, two or more mortgages are outstanding in different hands (g). Equity of redemption not saleable in parcels; as, if lands are in several counties; or if equity of redemption severed.

The equity of redemption cannot be sold unless "clearly existing on the face of the mortgage;" it must exist there- The equity, to be saleable, must exist on

(a) *Miller v. the Beaver Association*, 14 C. P. U. C. 399.

(b) *Per Spragge, V. C., McDonald v. Reynolds*, 14 Grant, 693.

(c) See *Scott v. Scholey*, 8 East, 467.

(d) *Bank of Upper Canada v. Brough*, 2 Err. & App. Rep. 95.

(e) See 27 Vic. ch. 15; *Lowell v. Bank of Upper Canada*, 10 Grant, 75; but see, per Burns, J., in *Levisconte v. Dorland*, 17 Q. B. U. C. 442.

(f) *Heward v. Wolfenden*, 14 Grant, 188.

(g) *Donovan v. Bacon*, Chancery U. C. 1869, not yet reported.

face of the mortgage.

under, and not by reason of collateral facts creating it (a).

Purchaser liable to incumbrances.

Execution creditor on sale should give proper information as to incumbrances, or sale might be set aside.

The purchaser should, by reason of his liability to pay off incumbrances (b), ascertain their nature and amount; on the other hand, the execution creditor must so proceed as that, from want of proper information, the sale should not be prejudiced, as in such case the sale might be set aside (c). If he is not aware of the nature and amount of incumbrances, it would be a wise precaution in him to enquire of the execution debtor, giving notice of the object, with a view to weaken the case of the debtor on a bill filed to set aside the sale if he withheld the information.

If a mortgagee purchase, the mortgage debt will as against the mortgagor and his representatives and persons liable as sureties for the mortgage debt be regarded as satisfied, and to an action for the debt it would seem the ordinary plea of payment would suffice, though no release under the act had been given (d).

Merger, &c.

The question of merger, and of the right of the purchaser to keep alive satisfied mesne incumbrances has been treated of (e): other points are treated of in considering sales under executions.

CON. STAT., CH. 22, SEC. 261.

As to seizure by sheriff of mortgage.

461. The sheriff or other officer, having the execution of any writ of *feri facias* against goods sued out of either of the superior Courts of Common Law, or out of any County Court, or of any precept made in pursuance thereof, shall seize any money or bank notes (including any surplus of a former execution against the debtor), and any cheques, bills of exchange, promissory notes, bonds, mortgages, specialties or other securities for money, belonging to the person against whose effects the writ of *feri facias* was

(a) *Fitzgibbon v. Duggan*, 11 Grant, 188; *McCabe v. Thomson*, 6 Grant, 175.

(b) See *Pegg v. Metcalf*, 5 Grant, 628, as to the effect of the sale, and cases ante pp. 350, 351, 352.

(c) *Ferguson v. Duggan*, 11 Grant, 184; *McDonald v. Cameron*, 13 Grant, 84; *Bebec Tokai Sherob v. Belgar*, 6 More Indian App. 510; *Jones v. Jones* 15 Grant, 40; and ante p. 330; post p. 376.

(d) *Woodruff v. Mills*, 20 Q. B. U. C. 51. (e) Ante p. 347, et seq.

issued, and shall pay or deliver to the party who sued out the execution, any money or bank notes so seized, or a sufficient part thereof, and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialities or other securities for money, as a security or securities for the amount by the writ and indorsement thereon directed to be levied, or so much thereof as has not been otherwise levied or raised, and such sheriff or other officer may sue in his own name for the recovery of the sums secured thereby, when the time of payment thereof has arrived. 20 Vic. c. 57, s. 22.

Money seized to be paid over to party taking out the execution.

The corresponding Imperial Act does not extend to mortgages. Though the Provincial Statute expressly names mortgages as regards authority to seize, and makes no mention of them as regards holding and suing, still this will not preclude the right to hold or sue (a).

Interest of mortgagee may be reached by seizing the mortgage, or by attaching mortgage debt.

If the execution creditor cannot through the sheriff seize a mortgage, he can nevertheless attach the mortgage debt.

An execution will not bind the interest of the mortgagee from its delivery to the sheriff, but only from seizure of the mortgage (b).

Execution binds only from seizure.

The covenant for repayment is not essential to the validity of a mortgage, for it may well be that the land alone is to form the security, and that the mortgagor shall incur no personal liability; consequently, in the absence of the covenant, or some evidence apparent on the face of, or given *dehors*, the mortgage, that a loan was in fact made or an antecedent debt existed, no action would lie against the mortgagor to recover the amount. In one case (c) wherein the mortgagee was seeking to recover from the mortgagor, and the covenant was omitted, and there was the usual proviso for redemption and total absence of any evidence to shew a loan or antecedent debt, the consideration in the

Covenant for payment, not essential.

Obligation to repay if no covenant.

(a) Bank of Upper Canada v. Shickluna, 10 Grant, 157.

(b) Smith v. Bernie, 10 C. P. U. C.

(c) Hall v. Morley, 8 Q. B. U. C. 584; see also Pearman v. Hyland, 22 Q. B. U. C. 202.

mortgage being expressed to be money *paid* by the mortgagee to the mortgagor, the law on the subject is thus laid down, "We think it clearly appears that in order to furnish ground for an action at law to compel payment of the mortgage money, there must be something beyond the mere proviso in the deed, which is simply a defeasance and nothing more. If there is no engagement expressed to pay the money, there must at least be what Lord Denman speaks of in *Yates v. Aston* (a), some proof of an advance made at the request of the mortgagor, for the mortgage itself certainly does not import that."

The covenant for payment prior to the 29 Vic. ch. 28, sec. 28, gave the mortgagee the benefit of priority over simple contract creditors in administration of assets, and time of bar by the Statute of Limitations is extended to twenty years.

The covenant should be in favor of the personal not the real representatives of the mortgagee, the former being entitled to the money, though the legal estate would descend to the latter. It is collateral to and does not run with the land as a covenant for title, but stands on the footing of a *chose in action*; and consequently on an assignment of the mortgage, the assignee must sue in the name of the mortgagee.

Limitation to recovery of interest.

Interest more than six years over due ceases to be a charge on the *land* by Con. Stat. ch. 88, sec. 19; but by Con. Stat. ch. 78, sec. 7, the personal remedy by action on the covenant continues for the interest and principal for twenty years (b). Apart from the Statute of Limitations, after expiry of twenty years non-payment and possession by the mortgagor, a presumption arises of payment and re-conveyance of the mortgaged estate to the mortgagor; but it has been held that the presumption did not exist, where the mortgage deed contained no redemise to the mortgagor and the land was vacant on execution of the deed (c). A place

Presumption of payment and reconveyance.

(a) *Yates v. Aston*, 4 Q. B. 182.

(b) *Sinclair v. Jackson*, 17 Bea. 405; see post p. 386 as to tacking interest to principal as against the heir though more than six years overdue, and resisting redemption unless all arrears are paid.

(c) *Mahar v. Fraser*, 17 C. P. U. C. 408, A. Wilson, J., *diss.*

of payment is seldom specified, though the so doing, or the giving the right to deposit in some bank to the credit of the mortgagee might in some cases avoid the necessity of personal legal tender to him.

The covenants for title are the same as in ordinary purchase deeds, except that the covenant for quiet enjoyment is made to take effect only after default in payment of the mortgage money. The covenants also are not limited as in case of an ordinary purchase to the acts of the grantor; this has been complained of on the ground that the result is after foreclosure or sale under a power of sale in the mortgage, that the mortgagor continues liable more extensively on his covenants which run with the land, than if he had sold the estate in the first instance; no doubt this is so: on the other hand, if through defect in title, the mortgagee lost the security of the land on recovery by a stranger through some defect in title not occasioned by the mortgagor, and the covenants for title were limited to his acts, the mortgagee might be in a very precarious position in case the day appointed for payment of the principal money were distant; whereas, if the covenants were general, he might sue on them at once in such case without waiting for the day appointed for payment, and the measure of damages would be, it is apprehended, the amount of the loan, for the mortgagee is entitled to what he stipulated for, viz., the security of the land, and failing that, to be reinstated and to a return of his money.

Insurance policies against loss by fire, or against the death of the mortgagor, frequently form a most important part of the security in a mortgage; as where the chief value of the property consists in buildings in the one case, or the mortgagor should have but a life or limited interest in the property in the other.

Objections are frequently made to lending on property where fire insurance is essential to the sufficiency of the security. This arises from the risk of the policy being void in its inception from improper description of the property insured, or from other inattention to important particulars,

or becoming vitiated after its creation on violations of the conditions by increase of risk or otherwise. The mortgagee also is frequently put to expense and trouble on a loss happening. In very many cases when a loss occurs, the insurance company is not legally liable, and it is more than probable that if mortgagees and others insured were now to examine the conditions endorsed on their existing policies, and the facts attendant on and subsequent to the insurance, they would find that their only security rested on moral obligation, or the fact that the companies know well that it is not to their interest to insist on strictly legal objections. On this Lord St. Lemards says (a), "Very few policies against fire are so framed as to render the company legally liable, generally the property is inaccurately described with reference to the conditions under which you insure. They are framed by the company, who probably are not unwilling to have a legal defence against any claim, as they intend to pay what they deem a just claim, without taking advantage of any technical objection, and to make use of their defence only against what they may believe to be a fraud though they may not be able to prove it." He goes on to mention the difficulty he had in endeavoring personally to effect a proper insurance. In practice it is not usual for the mortgagee to enquire into the validity of the insurance effected by the mortgagor.

Distinction between fire and life assurance; the former a mere personal contract of indemnity.

There is this distinction between an insurance against loss by fire and an insurance on a life, viz., that the latter, is a contract to pay a fixed sum, and at least where a man insures his own life, quite independent of any question of indemnity or loss consequent on death, whereas the former is strictly a personal contract for indemnity to the insured against loss, and does not extend beyond the amount of loss (b).

Fire insurance ceases on conveyance

The consequence is, that where the insured absolutely conveys the property insured, the policy ceases to be effective.

(a) Handy Book, 5 ed., p. 46.

(b) Dalby v. India and London Assurance Company, 15 C. B. 365; Smith Lg. Ca. 5 ed. 233, 249.

tual, for the insured can suffer no loss as to property not his; and in order that in such case, the policy if assigned, should continue effectual, the consent of the insurers should be obtained on the assignment (a). This it will be observed is quite independent of any conditions of the policy, which usually expressly provide that on any transfer of the property or of the policy, the consent of the insurers shall be obtained and signified in some particular way.

As however upon a mortgage, an interest is still left in the mortgagor, a transfer by way of mortgage would not, it would seem, be within the principle above alluded to applicable to absolute transfers, and an action might still be sustained in the name of the mortgagor, unless indeed the conditions of the policy vitiated it on assignment without consent (b). Frequently it will be found, the conditions of a policy are so worded as in strictness to render a consent of a particular nature to the proposed transfer requisite before the transfer, and that further notice of it should be given after it actually takes place: and even though the insurers consent to an assignment of the policy be given, and it expresses itself to be an indemnity to the insured and *his assigns*, still an action must be brought on any loss in the name of the insured and not of his assignee, on the general principle that a *chose in action* is not assignable (c).

by insured
without con-
sent of in-
surer,

unless con-
veyance be by
way of mort-
gage.

Action on pol-
icy cannot be
in name of
assignee.

Covenant to
keep up in-
surance.

If an existing policy be assigned the covenant to keep it up so long as any moneys remain due, should contain a stipulation to pay the annual premium requisite so to do, two or three days at least before the policy would expire, and produce the receipt on demand: this gives time to the mortgagee after default to pay, or insure himself before the policy expires. It should provide also that the mortgagor will do or suffer nothing whereby the policy may be vitiated, and that thereon or on any default by the mort-

(a) *Sadlers Company v. Badcock*, 2 Atk. 557; *Lynch v. Dalzell*, 4 Bro. P. C. 431.

(b) 2 Davidson Conv. 2 ed. p. 542.

(c) *Beemer v. Anchor Assurance Company*, 16 Q. B. U. C. 485.

gagor in keeping up the policy, the mortgagee may keep up the insurance or otherwise insure, and that the premiums so paid shall be a charge on the land.

Objections to interim receipts for insurance,

It frequently happens where there is no policy in existence, and time is of importance, that the mortgagor effects an insurance, and as some delay necessarily ensues before the policy can issue, he takes what is termed an *interim* receipt not under the corporate seal of the company, expressing that the property is insured and that a policy will be issued and the lender accepts the mortgage and rests satisfied with an assignment of this receipt. This is a course which may lead to difficulty, not only because when the policy subsequently does issue if in favor of the mortgagor, it may perhaps be requisite to go through further formalities as to its assignment, (to avoid which it is advisable to insure in the name of the mortgagee), but also because at law at least, on any loss happening before the policy issues, the company has been held not to be liable to pay the loss (a), on the general principle that corporations cannot contract except under their corporate seal. In any such event the company might be compelled in equity to make good their contract, and pay the loss (b); at law also an action would lie on a refusal to issue the policy (c); and as to executed contracts of corporations within the scope of their business and authority of which they have received the benefit, the tendency of recent cases is to relax the rule under which they were held not liable on the grounds of absence of the corporate seal (d).

Absence of corporate seal.

Cases where mortgagee insuring may retain the mo-

If the mortgagee should insure at his own expense, without having any right under the mortgage deed or otherwise to recover the premium from the mortgagor, then he is

(a) Jones v. Provincial Insurance Co., 16 Q. B. U.C. 477.

(b) Penlay v. Beacon Assurance Co., 7 Grant, 130.

(c) Jones v. Provincial Insurance Co., 16 Q. B. U. C. 477, per Robinson, C. J.

(d) Pim v. Municipal Council Ontario, in appeal, 9 C. P. U. C., 304; Whitehead v. Buffalo & Lake Huron Railroad Co., in appeal, 8. Grant, 157.

considered as having insured for his own benefit, and not for that of the mortgagor, or of the estate, and could retain the insurance money and also recover the mortgage money without any deduction; and in this respect he stands on much the same footing as a lessor insuring under like circumstances (a).

The act, 14 Geo. 3, ch. 78, s. 83, is to the effect that the insurance companies, on the request of any person interested in property destroyed or damaged by fire, or on any grounds of suspicion shall cause the insurance money to be laid out in rebuilding or reinstating the property, unless within sixty days after adjustment, the parties give sufficient security to the company that the money shall be so laid out, or a settlement be come to among the parties to the satisfaction of the company. It has been held (b) that this section applies here, and it follows that though as above stated as mortgagee insuring for his own sole benefit with-

neys on loss
without ap-
plying on the
mortgage.

14 Geo. 3, ch.
78, s. 83, as
to compelling
insurance
companies to
reinstate pro-
perty instead
of paying the
insured.

(a) *Dobson v. Land*, 8 Hare, 216.

(b) *Stinson v. Pennock*, 14 Grant, 604; see also *Re Barker*, 34 Law. J. Bkcy. 1. The Stat. 14 Geo. 3, ch. 78 repealed the Stat. 12 Geo. 3, ch. 73, and was passed for much the same object. The repealed act is not to be found in most of the editions of the statutes at large, but that act after certain sections applying expressly to certain specified limits of the weekly bills of mortality, goes on to enact in precisely the same words as section 83 of 14 Geo. 3, except that in this section 83 are left out words which are inserted in the corresponding section of 12 Geo. 3, viz., "within the limits by this act (12 Geo. 3), prescribed." The inference is strong when the Legislature re-enacted in the same words as the repealed act, except only that they omitted the words which confined the operation of the former act, that they did not intend the new act should be so confined. That this is a fair and strong argument may be gathered from the judgments in *ex parte Copeland*, 3 De G. M. & G. 914, and the *King v. Loxdale*, 1 Burr. 448; in the latter case Lord Mansfield says "where there are different statutes *in pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other." It is moreover a general principle that in construing a statute the old law is to be considered. From the title of the act 14 Geo. 3, it might be inferred that the whole act was limited in its operation; but the title is no part of a statute, and not to be regarded in its construction, (*Bac. Ab.* title Stat. 12); moreover it has been held that sections 84 and 86 are general and in force here. It must however be admitted that many text writers in stating that a covenant to insure runs with the land confine their remarks to cases within the Bills of Mortality, whilst others go the length of saying that beyond those limits the covenant would not run: *Platt on Covenants* 183., *Woodfall Land. & Tenant* 9 ed. p. 545., *Byth. Jarm. Conv.* by Sweet, 3 ed. 426.

out any right to charge the premium against the mortgagor, would be entitled to the mortgage money without deduction on account of any insurance money received on a loss, still practically the mortgagor by application of this section can get the benefit of the insurance by requiring the moneys to be expended on the estate: so also on the other hand in the same way a mortgagee might obtain the benefit of a policy not assigned to him effected by a mortgagor.

Mortgagee entitled to have insurance money payable to mortgagor laid out in reinstating property.

Apart even from the operation of the above act, it is said that though there were no assignment of the policy, or any agreement in regard to it, a mortgagee would still be entitled in equity to insist on the insurance money accruing on any loss being laid out in reinstating the property, provided the insurance existed at the time of the mortgage (a).

Covenant to insure runs with the land?

The section of the act above referred to being general in its application, it seems that a covenant to insure would run with the land in favor of assignees, though beyond the limits of the bills of mortality, as being a covenant which by force of the act which requires the insurance money to be laid out on the premises on request of any person interested, directly affects the land; and it is said that apart from the operation of the act, on general principles the covenant would also run, especially if the insurance money is to be laid out in reinstating the premises (b).

If a policy be assigned, and loss under it happens, how the moneys are to be applied.

If a policy be assigned, and nothing said as to how, in the case of loss, the insurance moneys are to be applied, then if the mortgage moneys be not payable on the loss happening, the mortgagor is entitled to have the insurance moneys received by the mortgagee applied in reconstruction of the property. The mortgagee is not compellable against his consent to apply them in reduction of his mortgage before it becomes payable, nor to invest them for the benefit of the mortgagor; neither is he himself entitled, without

(a) See Davidson on Conv., 2 ed., vol. 2., p. 541, referring to *Garden v. Ingram*, 23 L. J. Ch. 478, per Ld. C.

(b) Per Best, J., *Vernon v. Smith*, 5 B. & Al. 1. *Woodfall Land & Tenant*, 8 ed. 545. See contra *Platt on Covenants*, 185. *Byth. & Jarm. Conv.* by Sweet, 3 ed. 426.

the consent of the mortgagor, to lay out such moneys on investment; or (at least if not in possession) in reconstruction of the mortgaged premises; on the other hand, should the mortgagor withhold his consent to reconstruct, the moneys can remain idle in the hands of the mortgagee, who will not be, before the mortgage become payable, be charged with interest on them, or be liable to any deduction of principal or interest on his mortgage (a). The principle to be applied is that the insurance moneys represent the property.

Some of the following observations in regard to assurance on lives, equally apply to assurance against loss by fire; such as in regard to the concealment or misrepresentation of facts which will vitiate the policy, the notice of assignment requisite, &c. :

Policies of insurance on a life or lives frequently form a substantial part of the security on a loan, where the borrower has but a limited interest in the lands offered as security, as where he is tenant for his own life, or *pur autre vie*. So also where a life policy has been a long time in existence, and thus become valuable by accumulated bonuses, or the advanced age of the assured, the policy alone, if assigned with proper covenants and powers to the assignee, may form adequate security for a portion of its value. Life insurance.

A policy of insurance on a life is a contract, based on certain representations as to health, age, &c., and subject to certain conditions as to place of residence, &c., between the insurer and the insured, that the former will pay a certain fixed sum on a given event, as the death of a named person, in consideration (as one of the conditions) of certain fixed annual or other payments to be made to the insurer. The above is the simplest form of insurance, and the contract may be more complex as the circumstances of the case may require

It has before been mentioned (b) that the contract is to pay a fixed sum at all events, and is not, as is an insurance of indemnity. not a contract

(a) *Austin v. Story*, 10 Grant, 306.

(b) p. 362.

against loss by fire, in the nature of an indemnity to the insured against loss, but quite irrespective of any such question, except so far as it may be governed by Stat. 14, Geo. 3, ch. 48.

14 Geo. 3, ch. 48, restrains insurance to amount of interest in the life at the date of the policy.

That statute 14 Geo. 3, ch. 48, based on the policy of not allowing any one to have a pecuniary interest in the death of another, prohibits insurance on any life wherein the insured has no interest, and provides also that where the insured has an interest, no greater amount shall be recovered than the value of such interest *at the date of the policy*. If the insured had an insurable interest at the date of the policy, he can recover to that amount, though it should have ceased on the happening of the death insured against on the principle above explained that the contract is not one of indemnity (a); if the insurance should exceed the interest, the policy is not void, but good *pro tanto* (b). The interest must be a pecuniary one, (c.) but every one has an insurable interest in his own life.

Misrepresentation.

A policy is based on representations made as to age, health and other material particulars; most policies provide that any erroneous representation shall vitiate the policy, and in such case the materiality of such representation is not to be considered (d). Wilful misrepresentation or suppression, of a material fact, would vitiate the policy apart from any express condition to that effect (e). In most instances also the policies are liable to be avoided on certain named contingencies, as if the party whose life is insured should travel beyond certain specified limits, &c.

The policy a chose in action.

The policy being a chose in action is not assignable at law, so as to give the assignee a right of action in his own name; any action for the sum insured must be in the name of the insured or his personal representatives, even though

(a) Dalby v. India Ins. Co., 15 C. B. 392. 2 Smith, Lg. Ca. 6 ed. 246 overruling Godsall v. Boldero. (b) Ib.

(c) Von Lindenau v. Desborough, 8 B. & C. 586. Morland v. Isaac 20 Beav 389; see further as to insurable interests Bunyon on Life Insurance 14.

(d) Anderson v. Fitzgerald, 4 H. L. Ca. 484.

(e) Beemer v. Anchor Ins. Co., 16 Q. B. U. C. 485, a case of fire policy.

expressed to be made with assigns (a) : for the same reason also, as will be presently explained, notice to the insurer of transfer of the policy is all important.

From the above remarks may be gathered the matters deserving attention on the assignment of a life policy. As a preliminary step, enquiry should be made of the insurers, as to whether the policy is still subsisting, and whether they have received any notice of any prior transfer. As a general rule the assignee, from difficulty of enquiry into the facts, has to run the risk of the policy being invalid by reason of errors, or misrepresentation in the particulars on which it is based.

The assignment, if by way of mortgage, may be coupled with the grant of the land mortgaged, and the same with regard to the proviso for redemption. It should give power to sue in the names of the personal representatives of the insured, and to give receipts (b) ; the trusts should be declared of the moneys to be received, being to pay expenses, then the mortgage debt, and the surplus to the mortgagor. The covenants of the mortgagor will be not only to pay requisite premiums, and produce receipts, but not to do or suffer anything whereby the policy or any future policy may be avoided ; that if it becomes voidable he will do all things requisite to restore it ; that if it becomes void he will reinsure in the mortgagee's name ; that on default by mortgagor in regard to insurance the mortgagee may insure and pay premiums, and the mortgagor will repay and the expenses, and till re-payment the moneys shall be a charge on the lands and the policy. There should be a power to sell or surrender any policy, with the usual clauses exonerating the purchaser from seeing as to the regularity of the sale ; the trusts of the insurance money should be declared ; and the mortgagee declared not to be liable for involuntary losses. The frame of some of these trusts and declarations will be referred to hereafter in considering power of sale

Form of assignment of life policy.

(a) *Carter v. Boehm*, 3 Burr. 1905 ; 1 Sm. Lg. Ca. 6 ed. 490, in notes.

(b) *Brasier v. Hudson*, 9 Sim. 1.

of the land mortgaged, and the trusts of the purchase money.

Notice of assignment of policy should be given,

or a second assignee first giving notice may gain priority,

or payment made to assignor.

Notice of assignment of outstanding interests in personalty should be given,

not requisite as to real estate.

After the assignment notice to the insurers should immediately be given; this depends on the principle that as the debt, or chose in action assigned, is not capable as a chattel of actual delivery, still it must be rendered as complete as the nature of the transaction will allow, which is said to be, delivery of the security, if any, and notice to the debtor (*a*). Therefore a subsequent assignee of a chose in action may obtain priority by being the first to give notice to the party liable; if such subsequent assignee, however had notice of the prior charge at the the time of assignment, then of course he would gain no priority (*b*). To such an extent is the effect of notice carried that it would seem, that, even where the first assignee obtains possession of the policy, but omits to give notice, and a subsequent assignee has his enquiry for the policy evaded by the assignor, or even acting *bona fide*, makes no enquiry, he will, being the first to give notice, generally be preferred (*c*). It is manifest also that in the absence of notice, the party liable to pay might pay the insured, or original creditor, and thus the assignee be defeated; so also the policy might be surrendered.

The doctrine of notice both as to determining priorities and also in excluding the operation of the reputed ownership clauses hereafter referred to is not, of course, confined in its operation to policies of assurance, and other choses in action, but may be stated generally as applying to almost all dealings with reversionary or other partial interests and other outstanding rights and expectancies in personalty.

It does not apply however to equitable interests in real estate, that is, where the interest is existing in real estate which continues its character as such, and has not by direction to convert or otherwise assumed the character of mere

(*a*) *Jones v. Gibbon*, 9 Ves. 410; *In re Birch* 2 K. & J. 332; *Dearle v. Hall*, 3 Russ. 22, and see generally *Ryall v. Rowles*, 2 White & Tod, Lg. Cas. Eq. 3 ed. 670 et seq.; 2 Davidson on Conv. 2 ed. 484, n. a; 488.

(*b*) *Bunyon Life Ass.* p. 180.

(*c*) *Bunyon Life Ass.*, 182, 184; *Stocks v. Dobson*, 17 Jur 223.

personalty only, as for instance, trust money directed to be raised out of a sale of real estate, and so that it could only reach the party entitled as money (a).

There is also apart from the above considerations, the fact that under the English Bankruptcy Acts (b), the personal as well as the real estate situate here of a person who under them is adjudged a bankrupt becomes vested in the assignee in bankruptcy, and liable to the satisfaction of his debts. Under what are called the reputed ownership clauses of these statutes, if the bankrupt at the time of his becoming so, have in his possession order or disposition with the consent of the true owner, any goods or chattels whereof he was reputed owner, or had taken on himself the sale, alteration or disposition as owner, the same become liable to satisfy the creditors in bankruptcy. Con. St. ch. 18. s. 10. (8 Vic. ch. 48) has a clause to the same effect, and though it refers only in terms to goods and chattels, yet choses in action are thereby included (c).

Necessity for notice to avoid question of assignor still being deemed reputed owner

Con. Stat. ch. 18, sec. 10.

Under these reputed ownership clauses of the English Acts, it has been held that policies, (d) bonds and other choses in action (e) are within the meaning of the acts, and pass to the assignees in bankruptcy in the event of negligence in giving notice to the party liable, at any rate, if there be evidence of continued reputed ownership by the bankrupt; but it has been laid down that without some such evidence to bring the case within the act, mere absence of notice by the assignee of a policy is not conclusive against him (f).

(a) *Re Hughes*, 33 L. J. N. S. Cha. 725; *Jones v. Jones*, 8 Sim. 633; *Wilmot v. Pike*, 5 Hare 14; *Lee v. Howlett*, 2 Kay & J. 531.

(b) 12 & 13 Vic., ch. 106; 24 & 25 Vic. ch. 134, ante p. 20.

(c) *Ryall v. Rowles*, 1 Ves. Sr. 348; 2 W. & T. Lg. Ca. Eq. 3 ed. 670.

(d) *Faulkner v. Case*, 1 Bro. C. C. 125; *Gale v. Lewis*, 9 Q.B. 730.

(e) *Ryall v. Rowles*, 1 Ves. 384 supra; *Belcher v. Bellamy*, 2 Ex. 303; *Horn v. Baker*, 9 East, 215; 2 Smith Lg. Ca. 190 *in notis* and cases there cited; see also *Gibson v. Overbury*, 7 M. & W. 555.

(f) *Ex parte Cooper*, 2 M. D. & De G. 23; *Ex parte Heathcote*, 2 M. D. & De G. 711; *Ex parte Rose*, 2 M. D. & De G. 131; *Edwards v. Scott*, 1 M & G. 962.

For the transfer of the legal estate of the mortgagee at law no power of sale is requisite, and the assignee or vendee will take subject to such rights as may be subsisting in the mortgagor, or those who claim under him, of possession, redemption, or otherwise (a): and thus a sale and conveyance of the estate by the mortgagee to a vendee, though made professedly as on a power of sale in the mortgage, is valid to pass the legal estate of the mortgagee, even though no power of sale existed, or were improperly exercised; and when the mortgagor's right to possession is gone, the vendee can maintain ejectment; he occupies in fact the position of assignee of the mortgage (b). The chief object of the power is to enable the mortgagee or other party claiming through him to sell and convey the property free from the equity of redemption of the mortgagor, and of all claiming through him subsequent to the mortgage, whether by express charge or by execution, or otherwise, and thus avoid the expense of proceedings in Equity to foreclose or sell.

The power of sale is now very commonly made use of, and although at first sight its insertion may appear prejudicial to the interests of the mortgagor, yet in truth it is not so, if only to be exercised on reasonable notice after default and at public auction. The absence of such a power may be very prejudicial to the interests of both mortgagor and mortgagee, where the equity of redemption becomes incumbered by executions or otherwise, as on a suit for foreclosure or sale the incumbrancers have to be made parties, sometimes at great expense. As regards any objection on the ground of possibility of improper exercise of the power by an individual, which could not happen on sale under direction of the court, it will be seen in the sequel that a Court of Equity by application of the principle

(a) See post p. 388.

(b) See *Nesbitt v. Rice*, 14 C. P. U. C. 409.

that the mortgagee is trustee for the mortgagor, will closely scrutinize his conduct, and, if improper, afford relief.

The power of sale should be given to the mortgagee, his executors, administrators and assigns: it should not be given to heirs instead of the personal representatives, as the latter are entitled to the money, and the heirs are but the parties to convey the legal estate vested in them, which they hold as trustees for the parties entitled to the moneys, in which latter they may be in no way interested.

The word "assigns," as referable to the mortgagee, should never be omitted, for in its absence it is said (a) an assignee of the mortgage could not exercise the power of sale (b), and that it may be doubtful whether a devisee could (c).

The power should not be made conditional on notice being given, but if any notice is to be given, it should be provided for by a separate covenant by the mortgagee not to sell till after the specified notice (d).

As regards the clause or covenant providing that notice be given before sale under the power, it is said (e) that it is very advisable to omit the word "assigns," as referable to the mortgagor, from the clause requiring notice. If assigns are to receive notice, ample scope may however be given as the mode of giving notice, and it should be provided that the notice need not be personal, but may be left on the premises, and need not be addressed to any

(a) Byth. Jar. Con., by Sweet, vol. 5, p. 105; but it is to be observed that the cases referred to which are named in the two next following notes were cases of *trustees and trusts* for sale, and not of a mere mortgage with a power of sale. In a case of a *trust* created, it is clear the trust cannot be delegated, for it implies a personal confidence in the party named; see further, Lord Braybrooke v. Inskip. Tudor Lg. Ca., 2 ed. pp. 890, et seq., *in notis*.

(b) Bradford v. Belfield, 2 Sim. 264; see last note.

(c) Cooke v. Crawford, 13 Sim. 91; Wilson v. Bennett, 5 De G. & Sma. 475; Stevens v. Austen, 7 Jur. N. S. 873; Macdonald v. Walker, 14 Bea. 556; see also Ridout v. Howland, 10 Grant, 547.

(d) Forster v. Hoggart, 15 Q. B. 155; see post pp. 375; 424, n. i.

(e) Dart Vendors, 3 ed. p. 45 note r.

Notice of Sale. person by name or designation, or may be sent by post addressed to the party at the post office next his residence. In one case (a) the power of sale was conditional on default and notice in writing to the mortgagor, his heirs, executors, administrators or assigns, or left at his or their last or most usual place of abode, requiring payment; it was held that notice to the mortgagor alone was sufficient, and that it was well served by fixing it on the door of a house, alleged to have been his last known place of abode; at least that the onus was thrown on the parties objecting to the sale that something more should have been done. It was also held that it was not requisite to prove that the mortgagor was alive. This case has been referred to as warranting the proposition, that in case of an assignment of the equity of redemption, notice need not be given to the assignee, but it hardly warrants so broad a statement: it was a case (to put it simply) of a conveyance from W to S, declared void as against the creditors of W in a suit at their instance, but it was good as regarded a subsequent *bona fide* mortgagee for value from S; it was insisted the creditors should have had notice, and that the notice as served was insufficient. It will be observed the creditors did not stand in the position of assignees of the mortgagor, they did not claim *under*, but in fact *paramount* to the mortgage, and therefore the case perhaps, is hardly an authority that the notice would have been good if there had been an assignee. In a case wherein the mortgage provided that no means should be taken by the mortgagee to obtain possession till he should have given a month's notice in writing after default demanding payment, it was held on ejectment brought by the mortgagee that a notice signed by his attorney on record in an action on the covenant in the mortgage to recover the mortgage debt, a month prior to the ejectment, in which action the same attorney was also attorney on record was sufficient, and that no proof need be given of the authority of such attorney (b).

(a) Major v. Ward, 5 Hare, 598.

(b) Keyworth v. Thompson, 16 Q. B. U. C. 178.

It is important to provide that any sale by the mortgagee shall be valid as regards the purchaser in all events, leaving the former personally liable for improper conduct, if any; and that the purchaser shall not be bound to enquire as to whether notice has been given, or default made, or otherwise as to the validity of the sale: in the absence of such a clause the mortgagee selling may have sometimes difficulty in enforcing the sale against an unwilling purchaser (a). But such a clause will not protect a purchaser who has express notice that the notice of sale stipulated for has not been given (b).

The power usually authorizes a sale by private contract or at public auction, for cash or on credit, in whole or in lots, from time to time, under any special conditions of sale as to title or otherwise, with power at any sale at auction to buy in and re-sell without being responsible for any loss or diminution of price occasioned thereby, and to rescind or vary any contract of sale that may have been entered into (c).

On any sale under the power, the vendor must be careful so to act as that the interests of the mortgagor be not prejudiced by any negligence or misconduct. The duty of a mortgagee on sale by him resembles that of a trustee for sale (d) though perhaps a greater latitude may be allowed to a mortgagee than to a bare trustee not interested in the proceeds, and the court might restrain a sale by a trustee under circumstances in which they would not restrain a mortgagee (e). It is more advisable of course, to avoid any

Clause providing for validity of sale in any event.

Frame of power of sale.

Mode of exercise of power — duty of mortgagee.

Mode of sale.

(a) See *Hobson v. Bell*, 2. Bea. 17.

(b) *Parkinson v. Hanbury*, 8 W. R. 575.

(c) As to the object and necessity for these provisions, see *Jarman Byth Conv.* by Sweet, 3 ed. vol. 5, p. 412; *Davidson Conv.* vol. 2, p. 558, 2 ed.; *Dart Vendors*, 3 ed. pp. 34, et seq.; *Lewin Trusts*, 5 ed. 431; Ante p. 44, note referring to *ex parte Lewis*.

(d) *Richmond v. Evans*, 8 Grant 508; *Latch v. Furlong*, 12 Grant, 306, per *Mowat*, V. C. See also ante. n. c.

(e) As to cases wherein the court declined to interfere; *Matthie v. Edwards*, 11 Jur. 761; *Kershaw v. Kalow*, 1 Jur. N. S. 974; see also *Faulkner v. Equitable Society*, 4 Jur. N. S. 1214.

Duty of vendor.

ground of complaint of insufficiency of price or of unfair sale, that the property should be sold at public auction, instead of by private contract, even though the power authorize the latter. In one case where the mortgagee expressed a desire to get his debt only, and made no effort to sell, and never having advertized, sold at private sale at a great undervalue, the sale was set aside, though it did not appear that the purchaser was aware of the negligence of the mortgagee (a). Due notice by advertisement of the intended sale should be given, and perhaps as to this the practice which governs on sales by the direction of the Court of Chancery would be the safest guide. Unnecessary and too stringent conditions of sale as to title and production of title deeds or otherwise should be avoided as likely to prejudice the sale; and if in this, or other respects the conduct of the mortgagee be improper, not only will he be held responsible, but under circumstances the sale may be set aside (b); but the circumstances must be very strong to induce the Court to set aside a sale as against a purchaser acting *bona fide* (c), and if the sale were set aside as against such purchaser, he might be allowed for his improvements (d).

Cases where sale set aside as improperly conducted,

Value of improvements allowed.

Con. St. ch. 87, right of mortgagee to purchase himself.

The right of the mortgagee under Con. Stat. ch. 87, to purchase himself on sale under the power was before considered (e); as regards the right so to purchase apart from the statute, it is quite clear that a mortgagee has no such right, and that notwithstanding any such purchase, he will still continue mortgagee, and liable to redemption. A mortgagee stands as above remarked, much in the position

(a) *Latch v. Furlong*, 12 Grant, 303.

(b) *Richmond v. Evans*, 8 Grant, 508. *Jenkins v. Jones*, 2 Law T. N. S., 128; *Latch v. Furlong*, 12 Grant, 303, ante n. a; *McAlpine v. Young*, 2 Chan. Cham. Rep. 171; and ante pp. 330, 358. As to depreciatory conditions, see *Davidson Conv.* 3 ed. vol. 1, p. 441; *Sag. Vend.* 13 ed. p. 53; *Dart* 3 ed. p. 34.

(c) See p. 375, n. e.

(d) *Carroll v. Robertson*, 15 Grant, 173.

(e) p. 352.

of a trustee for sale; his duty as vendor is to obtain as much as possible for the property, his interest as purchaser is the reverse of this, and that the property shall sell for as low a price as possible. Courts of Equity forbid a man placing himself in this position, wherein his interest may conflict with his duty. So jealous are the courts in allowing the mortgagee to deal with the interest conveyed to him, that at one time it seemed questionable whether where the mortgagee should purchase on a sale for taxes the lands mortgaged, he would not still hold them as mortgagee, and as liable to redemption on the terms of the mortgage (a).

Mortgagee may buy in the estate for taxes.

And where a mortgagee bought the equity of redemption under pressure of an insolvent mortgagor, at considerably less than its value, the purchase was set aside at the instance of the assignee in bankruptcy of the mortgagor (b).

Purchase from mortgagor under pressure.

It has been held however, that a second mortgagee buying the legal estate on a sale by the first mortgagee, under a power of sale in his mortgage, takes the estate as any stranger, free from the equity of redemption (c). But if the mortgage of the second mortgagee be *in trust* for sale on default, instead of with the usual power of sale, so that the mortgagee stands more in the position of a trustee, then he cannot purchase from a prior mortgagee, but will continue to be trustee as regards the property purchased (d).

Second mortgagee buying estate on sale by prior mortgagee.

As a general rule the trusts of the proceeds of any sale should, after payment of the mortgage debt and expenses, be declared in favor of the mortgagor and his heirs, and not in favor of his personal representatives, unless indeed the mortgage be of leasehold property. Whoever has the right to redeem, is the person who is entitled to the residue of the property left unsold after satisfaction of the mortgage

Application of surplus proceeds of sale.

(a) *Smart v. Cottle*, 10 Grant, 60, per VanKoughnet, C.; *Scholfield v. Dickinson*, 10 Grant, 226—that on such purchase he can hold absolutely, see *Kelly v. Macklem*, 14 Grant, 29.

(b) *Ford v. Olden*, Law R. 3 Eq. 461; see also *Webb v. Rorke*, 2 Sch. & Lef. 661.

(c) *Shaw v. Burny*, 11 Jur. N. S. 99; *Parkinson v. Hanbury*, 13 W. R. 331; *Watkins v. McKellar*, 7 Grant, 584; *Brown v. Woodhouse*, 14 Grant, 684.

(d) *Parkinson v. Hanbury*, 8 W. R. 575; 1 Drew & S. 143; 13 W. R. 331.

debt, and to the surplus proceeds if all be sold. If the mortgagor does not intend this, but intends a conversion in the event of a sale, and that the proceeds shall go as personal estate, then that should be clearly expressed; for when there is a mere power and not an absolute trust for sale, and a sale take place *after* the death of the mortgagor, the surplus proceeds will go to the heir, even though the trust of them be declared in favor of the personal representatives (a). On a badly drawn mortgage by inattention to the above, the mortgagee may frequently be misled into payment to the wrong party. Where a sale is had in the lifetime of the mortgagor, the surplus proceeds will go to personal representatives on his death before payment: the general principle is, the property or its proceeds will where there is a mere power of sale, go to real or personal representatives, according to the state in which it was on the death of the mortgagor.

As to garnishing surplus proceeds of sale.

When the mortgagor had by the terms of the mortgage a remedy at law for the surplus proceeds of the sale, and not a mere right in equity to call on the mortgagee to account for them, Draper. C. J., gave an order in Chambers (b) at the instance of a judgment creditor of the mortgagor to garnish such surplus, although it appeared that other judgment creditors were prior as regards registry of their judgments to him in whose favor the order was made. But if by the terms of the mortgage the mortgagor has no remedy at law for the surplus proceeds the right thereto cannot be garnished as a debt due him (c): and it would seem also there is no remedy in equity, by garnishment at least (d).

Distress clause,

As a security to the mortgagee for the payment of interest, he has sometimes granted to him the summary remedy of distress therefor; this is effected in two modes, either by

(a) Wright v. Rose, 2 Sim & Sta. 323; Bourne v. Bourne, 2 Hare, 35; Lewin on Trusts, 5 ed. 686; see also Fletcher v. Ashburner and Ackrodt v. Smithson, 1 White & Tud, Lg. Ca. equity, *in notis*.

(b) McKay v. Mitchell, 6 U. C. L. J. 61.

(c) Smith v. Trust and Loan Company 22 Q. B. U. C. 525.

(d) Horsley v. Cox, L. R. 4 Cha. App. 92. As to equitable execution, see ante p. 318, n. b; Gore v. Bowser, 24 L. J. Cha. 316, 440.

simple grant of right to enter and distrain for arrears of interest and expenses, and to dispose of the distress as landlords may do for rent in arrear; or, by the operation of an attornment clause, actually creating the relative positions of landlord and tenant. If the remedy be given by the former mode, viz., by mere grant of right to distrain, then it will be seen it is less efficacious than the latter, for it can operate as nothing more than a mere personal license to take the goods of the mortgagor; it cannot operate so as to give the mortgagee the ordinary right of landlords to take the goods of third persons on the premises demised (*a*). Neither can it operate as a grant of a rent charge for want of an estate in the mortgagor whereout to grant it (*b*), his estate having been conveyed by the mortgage. It is therefore more to the interest of the mortgagee to constitute the mortgagor his tenant, either at will, or from year to year: the latter tenancy is to be preferred, as the former is defeasable by the death (*c*), or alienation of either party with notice to the other (*d*), and consequently the rent is precarious. If a tenancy from year to year be created, care must be taken to introduce a clause enabling the mortgagee at any time after default to determine the tenancy, as otherwise, unless intent to the contrary were apparent on the mortgage, the ordinary right given to the mortgagee to enter might be overridden, and the mortgagor might, notwithstanding default by him, be entitled to the usual half-year's notice to quit, incident to a tenancy from year to year before the tenancy could be determined (*e*). If an attornment clause as above, creating a tenancy, be introduced, it will be unnecessary, perhaps indeed improper, to insert the usual clause authorizing the mortgagor to retain possession till default.

does not confer a landlord's remedies,

Tenancy or attornment clause.

(*a*) *Freeman v. Edwards*, 2 Ex. 732; *Royal Canadian Bank v. Kelly*, 19 C. P. U. C. 196, per Gwynne, J.

(*b*) Per Patteson, J., *Doe d. Garrod, v. Olley*, 12 A. & E. 481; see per Park, B., in *Freeman v. Edwards*, 2 Ex. *supra*.

(*c*) *Turner v. Barnes*, 2 B. & S. 435.

(*d*) Post p. 393, n. *d*.

(*e*) *Metropolitan Society v. Brown*, 4 H. & N. 428. *Doe d. Bastow v. Cox*, 11 Q. B. 122; see further the notes to *Keech v. Hall*, 1 Smith Lg. cases, 523.

**Attornment
or tenancy
clause.**

The tenancy is created by a clause declaring that the mortgagor attorns and becomes tenant from year to year (or otherwise) to the mortgagee, his heirs and assigns, of the premises conveyed, at the yearly rent of a sum named equivalent to the interest, payable in half-yearly or other payments, according to the days fixed for payment of interest, with a proviso that the mortgagee, his heirs or assigns may on certain events, as default in payment, or breach of covenant, enter and determine the tenancy without notice. This tenancy would not seem to be open to any objection on the ground of want of certainty in the term (a): a subject which is hereafter considered. In a recent case (b), a mortgagor in possession conveyed by way of mortgage to the defendants to secure advances, on trust that they might immediately, or at any time, sell the premises. The conveyance recited the prior mortgage, and contained an attornment clause, under which the mortgagor became tenant to the defendants for ten years at a yearly rent, provided the security should so long subsist, with power to the defendants at any time before or after sale, without any demand, to enter and determine the term. The defendants never executed the conveyance. It was held that it was apparent on the deed that the parties only intended to create a tenancy at will, consequently that the non-execution of the deed was immaterial; and that as the parties had by the deed agreed that the relation of landlord and tenant should be created between them, the mortgagor was estopped from setting up that the defendants had no legal reversion, notwithstanding that fact appeared on the mortgage; and a distress for the rent was held good. Lush, J., observed, "It is plain that there was no intention that the mortgagor should remain in possession any given length of time, but that he should remain on the premises at the will of the mortgagees, he binding himself to pay £800 for a term not exceeding ten years, if left in possession so long." As regarded the creation of a term for ten years, and non-

(a) *Wilkinson v. Hall*, 3 Bing. N. C. 533; *Ford v. Jones*, 12 C. P. U. C. 358.

(b) *Morton v. Woods*, L. R. 3 Q. B. 658.

execution by the mortgagees, Blackburn, J., seemed to think it possible, if it were necessary to decide on the effect of non-execution, that the instrument might operate as a conveyance to the mortgagees to the use of the mortgagor for ten years: he agreed however, that the tenancy was at will.

A very recent case (*a*) bears as well on the creation of relationship of landlord and tenant between mortgagor and mortgagee, as on the effect of a license granted by the mortgagor to distrain for interest in arrear as for rent in arrear. The case is of importance from the frequency with which the facts are likely to occur, by reason of the very general adoption of the forms given by the act.

It was an action of replevin, and "the defendants avowed in substance that before the said time when, &c., one *Dewey* mortgaged to defendant *Kelly* certain lands, the said mortgage containing a proviso for making the same void on payment of the amount secured by a day named, and covenant for payment, and also covenant for distress, on default in payment, in accordance the terms of clause 15 of schedule 2, 27 & 28 Vic. ch. 31, with an averment that there were due \$1,412.50 for interest, and that default been made, and thereupon defendant *Kelly* distrained. The second avowry was in all respects similar to the first, with the exception of an averment that the covenant for distress was a license to take any goods found on the premises, and the plaintiffs claimed the goods under the alleged conveyance thereto from said *Dewey* subsequently to said mortgage and the accrual of the interest thereunder; and that plaintiff had at the time of said conveyance notice of said mortgage, its covenants, &c."

Relationship of landlord and tenant, and right of distress under 27 & 28 Vic. c. 31, clauses 15 & 17.

The avowries were demurred to, and were held bad as not shewing "that the mortgage contained a provision that the mortgagor should be permitted to continue in possession of the mortgaged premises, nor that he did occupy in pursuance of such permission at the time of distress, or at any

(a) *Royal Canadian Bank v. Kelly* 19 C. P. U. C. 196.

Royal Canadian Bank v. Kelly.

time," which it was considered were matters necessary to be averred.

By the judgment (p. 201) it would appear that in the covenant for payment no day was named for payment of interest except the one day named for payment of principal. The distress was made after default in the covenant; and by the judgment the distress appears to have been made only for the interest which accrued due up to the day of payment of principal named in the mortgage. It is said to have been admitted on argument that the mortgage was in fact drawn under the act of 27 & 28 Vic., but there was nothing on the record to shew that; though it did so happen that the license to distrain was identical with the lengthy form set out in the second column of the act; and why the lengthy form was adopted, and yet the mortgage drawn with reference to the act, did not appear. As the mortgage was admitted to have been drawn under the act, and "to contain a clause providing for the mortgagor continuing in possession," it is to be assumed the language of that clause was the same as clause 17 of the forms given by the act.

The authorities on the so-called attornment, possessory, and distress clauses were reviewed at length, and the following is so much of the judgment as bears on the facts as above stated:—

"The language of the covenant is, as it appears to me, very different from that used in *Chapman v. Beecham* (a), *Doe Wilkinson v. Goodier* (b), and *Pollitt v. Forrest* (c). The covenant is not, that the mortgagee may 'distrain for the interest' *in like manner* as landlords are authorized 'to do in respect of distress for arrears of rent upon leases for years,' nor 'in like manner as for rent reserved by lease,' nor is the covenant in a negative form, imposing a penalty for which the mortgagee may distrain *as for rent* in arrear as in *Pollitt v. Forrest*; but it is, that if the mortgagor make default in payment of interest, it shall and may be lawful

(a) 3 Q. B. 723.

(b) 10 Q. B. 957.

(c) 11 Q. B. 962.

for the said mortgagee, his heirs or assigns, to distrain therefor on the *said lands*, &c., or any part thereof, and by distress warrant to recover, '*by way of rent*,' (that is, as it appears to me, to recover the interest *as rent in the character of rent*) reserved, *as in the case of a demise of the said lands*, &c.; that in fact, the interest shall be payable as rent reserved by the mortgagee, as in the case of a demise (which this indenture is to be taken to be) of the *said lands* from the mortgagee to the mortgagor.

This, it appears to me, is the natural construction to put upon the intention of the parties, as expressed in these terms, coupled with a clause that the mortgagor shall remain in possession of the lands, and his occupation in pursuance of such agreement.

Upon the whole, I have come to the conclusion that a clause in a mortgage, that the mortgagor shall continue in possession coupled with his occupation in pursuance of such clause, and coupled also with a covenant for distress, in the terms contained in this instrument, does create the relation of landlord and tenant at a fixed rent; that by the indenture of mortgage, in this case, the tenancy created was until the day of re-payment of the principal for a determinate term, and thereafter a tenancy at will at an annual rent, incident to which tenancy was the right of distraining upon the goods of third persons upon the premises. I am however, of opinion, that the demurrers to these avowries must prevail; for in neither of these avowries is it alleged that the mortgage contained a provision that the mortgagor should be permitted to continue in possession of the mortgaged premises, nor that he did occupy in pursuance of such permission at the time of the distress, or at any time, which are matters, as it appears to me, necessary to be averred. The distress appears to have been made only for the interest which accrued due up to the day of payment of principal named in the mortgage, and, treating the tenancy to that day to be for a determinate period, and not at will, it is important to enquire whether the will was determined in any way on that day or at any time prior to the distress;

Relationship of landlord and tenant and right of distress under 27 and 28 Vic. c. 31, clauses 15 & 17, coupled with occupation.

Royal Canadian Bank v. Kelly.

for if the distress was made after the will had been determined, and the mortgagor continued in possession as a trespasser, then the distress can only be sustained as a distress, after the determination of a term, under 8 Anne, ch. 14, in which case it would seem to be necessary to aver that it was made within six months after such determination, and during the possession of the same person, who had been a tenant; and it is for the avowant to shew clearly his right to distrain: *Haacke v. Marr* (8 C. P. 41)."

The learned Judge who gave judgment placed some stress on occupation before, as well as after, the determination of the term, from which it would seem that he did not regard the case as one simply in all respects as of demise to a tenant for a term certain at a fixed rent, in which case the entry or occupation would be immaterial (a).

Mortgagor continuing in possession after expiry of redemption.

It was further considered that after the payment of the principal, and the determination of the term on that day, (the mortgagor continuing in possession), there was created "a tenancy at will at an annual rent, incident to which tenancy was the right of distraining on the goods of third persons on the premises," notwithstanding the covenant as to interest, and so consequently the distress clause as to rent, did not extend to payment of interest after the principal fell due and the then determination of the term, and absence of evidence of assent to a tenancy at will at a rent on the holding over after expiry of the term (b).

(a) 1 Wms. Saund. 202, a. n. 1.

(b) As to possession under an executory demise, or agreement for a lease at a fixed rent, and liability for the rent, and moneys made payable *qua* rent, *Anderson v. Midland Railway Company*, 3 E. & E. 614; *Marquis Camden v. Batterbury*, 5 C. B. N. S. 808. As to a mortgagor in possession, *Hitchman v. Walton*, 4 M. & W. 413. per Abinger, C. B.; *Turner v. Doe d. Bennett*, 9 M. & W. 643; *Partridge v. Bere*, 5 B. & Ald. 604, *Watkins Conv.* 9th ed. p. 13, note; *Doe Roby v. Maisey*, 8 B. & C., 767; *Wilkinson v. Hall*, 3 Bing. N. C. 533; 1 Smith, Lg. Ca., 6th ed. 528, 536; Post p. 388; As to implied tenancy at will in case of mortgagor in possession, see post, p. 388, note d. As to liability of a lessee who holds over after expiry of his term for rent alleged to fall due afterwards and during possession; *Jenner v. Clegg*, 1 Moo. & R. 213; *Alford v. Vickery*, 1 Car. & M. 280; *Williams v. Stiven*, 9 Q. B. 14.

The operation of the proviso for quiet enjoyment by the mortgagor is hereafter alluded to (a) : it will there be seen that it is frequently invalid for the purpose intended: questions on this proviso frequently arise in actions of ejectment, and on its effect depends also the period from which the Statute of Limitations will begin to run against the mortgagee.

Unless there be some absolute necessity for the mortgagee to enter into possession, such a course is usually avoided, for it involves an account between him and the mortgagor. A mortgagee in possession is liable to account for what he has received, or for what without wilful default, he might have received (b). He is chargeable with an occupation rent in respect of property held by himself, and is liable for voluntary waste, (as in pulling down houses or opening mines). As a mortgagee in possession is regarded in some measure in the light of a trustee, he will, if he assign the mortgage and possession to another without the assent of the mortgagor, *continue* to be accountable and chargeable for rents and profits after assignment (c) ; a matter of some importance where they should be large, and the assignee should receive, or but for his wilful default might have received, more than sufficient to pay the mortgage debt.

For many improvements he might make he will not be allowed, as otherwise by large expenditure he might preclude the mortgagor from redeeming (d). This would be what has been termed "improving the mortgagor out of his estate" (e).

In the absence of any contract by the mortgagor to insure, or that he, the mortgagee, may, he cannot add any premiums he may pay for insurance to the mortgage debt as a charge

Proviso for quiet enjoyment till default.

Inadvisable that mortgagee should take possession.

Liability thereon to account.

What charges allowed as against mortgagor.

(a) Post, p. 388.

(b) As to the nature and extent of liability, see *Coldwell v. Hall*, 9 Grant, 110; *Paul v. Johnson*, 12 Grant, 474; see also generally as to liability of mortgagee, *Taylor Cha. Orders*, 3 ed. p. 232.

(c) 1 Eq. Ca. Abg. 328, pl. 2. (d) *Kerby v. Kerby*, 5 Grant, 587.

(e) *Sandon v. Hooper*, 6 Bea. 246.

on the property (a). He may charge his actual expenses, but cannot stipulate for an allowance or commission to himself for the trouble of collecting the rents; nor charge for his trouble in collecting the rents. He may however, when the collection of the rents would involve time and trouble, appoint a receiver, and allow and charge a reasonable remuneration for the services of such receiver. He will be also allowed for repairs, and expenses incurred in upholding the mortgagor's title against adverse claimants.

Con. St. c. 88,
s. 19.
Interest 6
years over due
ceases to
charge the
land,

By Con. Stat. ch. 88, sec. 19, "No arrears of rent or of interest, in respect of any sum of money charged upon or payable out of any land, or rent or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent." 4 W 4, c. 1, s. 45.

but as against
heirs of mort-
gagor all ar-
rears recover-
able on the
covenant al-
lowed; as also
where mortga-
gor is seeking
to redeem, or
mortgagee has
sold under
power of sale.

As the mortgagee can reach assets descended to the heirs of a mortgagor by suit against them on the covenant of their ancestor, and also by suit against the personal representatives, and in such suit the equity of redemption would be saleable, the mortgagee to avoid circuity of action is allowed, as against the heirs, to tack to his mortgage debt the whole arrears of interest, though exceeding six years, recoverable on the covenant (b). And it would seem that where the mortgagor is seeking to redeem, or the mortgagee has sold under his power of sale, and has surplus proceeds on hand, he is entitled to all arrears of interest that are recoverable on the covenant (c), which by Con. Stat. ch. 78, sec. 7, are only barred after twenty years, notwithstanding ch. 88. sec. 19.

Con. St. c. 78,
s. 7.

Interest how
calculated.

As regards calculation of interest when partial payments have been made, these are to be applied when the principal

(a) Dobson v. Land, 8 Hare, 216; Brooke v. Stone, 34 L. J. Ch. 251; but see Scholefield v. Lockwood, 9 Jur. N. S. 738.

(b) Carroll v. Robertson, 15 Grant, 173; Fisher, Mortgages, 2 ed. 925, 926.

(c) Edmunds v. Waugh, L. R. 1 Eq. 418., questioning Mason v. Broadbent, 33 Bea. 296; see further Ford v. Allen, now pending in Chancery.

is not overdue in reduction of interest. When the principal is overdue, it is much to the mortgagee's interest to apply the payments on the interest, and he is entitled so to apply them, in the absence at least, of any appropriation of such payments by the debtor. The method usually adopted in making out an account, viz., that of charging first the interest on the whole debt for the whole period, as if no payment had been made, then allowing interest on each payment from the time it was made, and then deducting all the payments and interest on them from the whole debt and interest on it, is not the correct way of arriving at a balance; it is so much in favor of the debtor, that where there has been a long arrear of interest, and payments made on account by the debtor not covering the interest alone, the debtor in the course of time, without adding any payment in the meantime will make his creditor his debtor (*a*).

There is sometimes a provision that if interest be not punctually paid, the rate shall be increased; in such case the increased rate will be viewed merely as a penalty against which a court of equity will relieve. On the other hand if the higher rate be named as that at which interest shall be paid with a provision for its reduction on punctual payment, here on default the higher rate can be enforced and no relief had (*b*). And so also a stipulation that if the principal be not paid on the day named, the rate shall be increased is enforceable in equity as well as at law (*c*).

Provision as to increase of interest.

There has now to be considered the respective positions of the mortgagee, mortgagor, and tenants of the mortgage, both on demise before and after the mortgage.

Right of possession.

As between mortgagee and mortgagor merely, at first sight it would appear as though there could be no great difficulty in determining their respective rights to possession, or in defining the position of a mortgagor: it will be seen, however that it is a matter of some difficulty.

Definition of position of mortgagor in possession.

(*a*) Sir James McGregor v. Gaulin, 4, Q. B. U. C. 378. The above is the mode usually adopted by merchants, and there is no doubt that where their transactions are large, they must lose greatly by it.

(*b*) Davidson Conveyancing, 2nd ed. vol 2, 535.

(*c*) Waddell v. McColl, 14 Grant, 211.

Definition of position of mortgagor in possession.

Lord Wensleydale has said (a) "a mortgagor is not in all respects a mere bailiff, he is much like a bailiff; he is not a mere tenant at will; in fact he can be described merely by saying he is a mortgagor." Lord Denman has said it is a very dangerous thing to attempt to define the position of a mortgagor. Under the selfsame circumstances a mortgagor in possession has sometimes been termed tenant at sufferance, sometimes tenant at will, sometimes tenant at will *quodammodo* (b). It is therefore dangerous to infer that under certain circumstances a mortgagor in possession has all the rights or liabilities of an ordinary tenant at will or at sufferance, merely because in such circumstances in one or more cases he is designated as a tenant of either character.

Right of possession between mortgagee and mortgagor.

When mortgage silent as to possession.

When mortgage silent as to possession, and mortgagee consents to mortgagor's possession.

The right to possession as between mortgagee and mortgagor may be considered under the following heads:—

1. When nothing is said as to possession in the mortgage, or at or after its execution, and no tenancy is created by any implied or express agreement; here the mortgagee's right of possession exists from the time of execution of the mortgage (c); and the mortgagor continuing in possession is in the position of a tenant at sufferance.

2. If the mortgage is silent as to possession, and the mortgagee either expressly consent to the mortgagor remaining in possession, or the facts are such that such consent can be implied (d), then the mortgagor cannot be treated as a trespasser, or tenant at sufferance, and so ejected without demand of possession. The position of a mortgagor under these circumstances is that of a tenant at will both as regards right to possession and the application of the Statute of Limitations.

(a) *Eitchfield v. Ready*, 20 L. J. Ex. 52; and see 11 A. & E. 314.

(b) See notes to *Keech v. Hall*, 1 Smith, Lg. Ca. 2 ed. 537.

(c) *Doe. d. Mowat v. Smith*, 8 Q. B. U. C. 139.

(d) Can such consent be implied so as to create a tenancy at will from the mere fact of silence by the mortgagee and his knowledge that the mortgagor remains in possession? See notes to *Keech v. Hall*, *supra*; and *Evans v. Elliot*, 9 A. & E. 342; *Royal Canadian Bank v. Kelly*, 19 C. P. U. C. 196, per Gwynne, J.

3. If nothing appear as to a tenancy or right to possession, beyond a covenant by the mortgagor that *after* default the mortgagee may enter, hold, possess and enjoy, this will not by implication override the effect of the conveyance which gives an [immediate right of entry to the mortgagee: such a covenant may be regarded only as an ordinary covenant for quiet enjoyment, to take effect after default (a).

Mere covenant by mortgagor that mortgagee after default may enter.

4. If the mortgage contain a positive agreement or proviso that till default in payment on certain named days, the mortgagor may remain in possession, this operates as a re-demise to the mortgagor "for as long as he had time given him to redeem by payment of the mortgage money, unless he make default in any intermediate payment," as being an *affirmative* agreement by the mortgagee for a *definite named* time, and the mortgagee's right of entry will accrue only on default (b).

Positive agreement that mortgagor may remain in possession till default.

5. On default in the last instance the mortgagor becomes tenant at sufferance.

On default.

6. If the duration of the intended demise be uncertain, or couched in the shape only of a *negative* covenant by the mortgagee, it has been said this will not operate as a valid demise (c): thus a mere covenant by the mortgagee that in case of non-payment on the day named he would not enter till after a month's notice in writing, has been said to be invalid as a demise, on the double objection of want of certainty, and of affirmative language; and the following passage in Sheppard's Touchstone (8 ed. 272) has been referred to: "If A do but grant and covenant with B, that B shall enjoy such a piece of land for twenty

Possessory right on uncertainty of the term, or mere negative covenant by the mortgagee not to enter

(a) Doe d. Roylance v. Lightfoot, 8 M. & W. 553.

(b) Wilkinson v. Hall, 3 Bing. N. C. 533; Ford v. Jones, 12 C. P. U. C. 358.

(c) See the notes to Keech v. Hall, 1 Smith Lg. Ca. 6 ed. p. 523; see also on the question as to certainty, Ashford v. McNaughten, 11 Q. B. U. C. 171; McMahon v. McFaul, 14 C. P. U. C. 433; Konkle v. Maybee, 23 Q. B. U. C. 274; Sidey v. Hardcastle, 11 Q. B. U. C. 162; Copp v. Holmes, 6 C. P. U. C. 373; Richardson v. Langridge, Tudor's Lg. Ca. 2 ed. p. 14, and cases there referred to; see also a review of the cases in Royal Canadian Bank v. Kelly, 19 C. P. U. C. 196.

years, this is a good lease for twenty years: so if A promise to B to suffer him to enjoy such a piece of land for twenty years, this is a good lease for twenty years. So if A license B to enjoy such a piece of land for twenty years, this is a good lease for twenty years. And therefore it is the common course if a man make a feoffment in fee, or other estate, upon condition that if such a thing be or be not done at such a time, that the feoffor, &c., shall re-enter, to the end that in this case the feoffor, &c., may have the land, and continue in possession until that time, to make a covenant that he shall hold and take the profits of the land until that time; and this covenant in this case will make a good lease for that term; if the *uncertainty* of the time, whereunto care must be had, do not make it void;" (Mr. Preston adds: The limitation of a certain term, with a collateral determination on the event, would meet the difficulties of the case) "and therefore if A bargain and sell his land to B on condition to re-enter if he pay him £100; and B doth covenant with A that he will not take the profits until default of payment; in this case, howbeit this may be a good covenant, yet it is no good lease (for want, says Mr. Preston, of a more formal contract, and also for want of certainty of time). And if the mortgagee covenant with the mortgagor that he will not take the profits of the land until the day of payment of the money, in this case, albeit the time be certain, yet this is no good lease but a covenant only," (since, says Mr. Preston, "the words are negative only and not affirmative).

The above passage from the Touchstone was referred to in a modern case (a), in which the mortgage named a day for payment, and provided that in case of non-payment, after a month's notice according to the covenant, it was to be lawful for the mortgagee to enter into possession and lease and sell; and there was a negative covenant by the mortgagee that *no sale or lease* should be had till after one month's notice, demanding payment of that which at the

(a) Doe d. Parsley v. Day, 2 Q. B. 147.

end of that time should be due, and default made at that time: ejectment was brought after the day named, by the mortgagee, no notice or demand of any kind appeared to have been given, and objection was taken on that ground. The court, after quoting at length from the Touchstone, and stating that "after the day of payment, the time, if any, during which the mortgagor was to hold, was not determinate, but altogether uncertain; neither was there any affirmative covenant whatsoever that he should hold at all;" considered further, that "the covenant therefore that the mortgagee shall not *sell* or *lease*, even if it be construed should not *enter*, until a month's notice, was a covenant only and no lease;" and consequently "that there was no re-demise so as to entitle the mortgagor to notice or demand of possession, but he was in the same position that mortgagors usually are, viz: liable to be treated as trespassers at the option of the mortgagee." The court in the above case distinguished as to others (a), and remarked also as to another case (b), that "it may be questionable whether sufficient attention was paid to the point as to the *certainty* of the time; at all events it was not decided on any ground that such certainty was immaterial."

7. If by the operation of an attornment clause, as before explained, the mortgagor should expressly become tenant to the mortgagee, either at will or from year to year, at a rent, then he will have the ordinary right to possession of any such tenant, except in so far as such right may be qualified by the mortgage itself in giving right to entry without notice on default in payment, or non-observance of covenants.

Possessory
right on at-
tornment.

8. Those cases where, as in the fourth and seventh instances above, the proviso for possession is valid as a re-demise by the mortgagee if the mortgage were executed by him, but if not so executed, might fail to create the term intended, as not being in compliance with the Statute of Frauds, or Con. Stat., ch. 90.

On non-exe-
cution by
mortgagee of
the mortgage

(a) *Wheeler v. Montefiore*, 2 Q. B. 133.

(b) 2 *Doe d. Lyster v. Goldwin*, 2 Q. B. 143.

Non-execution of mortgage by mortgagee.

The term may be executed by way of use in favor of mortgagor.

It would seem that where the proviso for possession would give a right to possession exceeding three years, though subject to earlier determination on default by the mortgagor, that non-execution by the mortgagee will cause the proviso to be invalid to create the term, or right to possession intended (a); unless indeed the mortgage can operate to execute the term by way of use. Thus it may well be contended that on a mortgage in fee by way of release or statutory grant, wherein the day for payment should be more than three years from execution of the mortgage, with a proviso for possession by the mortgagor till default, that it might operate to create a use for the term in the mortgagee for the mortgagor, which the statute would execute (b), and as to which the execution by the mortgagee would be immaterial. If however, the conveyance should be as is usual, unto and to the use of the mortgagee, or otherwise there should be a use on a use, then of course no legal estate in the term would be executed (c).

Where the term intended to be created cannot be executed in the mortgagor under the Statute of Uses, and assuming, as would seem to be the case (d), that where it would exceed three years, the non-execution by the mortgagee would prevent its taking effect;

(a) *Swatman v. Ambler*, 8 Ex. 72; *Pitman v. Woodbury* 3 Ex. 4; *Doe v. Lightfoot*, 8 M. & W. 553; *Wilkinson v. Hall*, 3 Bing. N. C. 533; *Ford v. Jones*, 12 C. P. U. C. 358.

(b) *Morton v. Woods*, L. R. 3, Q. B. 658, per Blackburn, J.; in argument and judgment, see this case ante p. 380; see *Simpson v. Hartman*, 27 Q. B. U. C. 460, where a mother seised in fee in consideration of five shillings and natural love, granted, bargained, and sold to her daughter and her heirs, to *their own use*, for ever, "reserving, nevertheless, to my (the grantor's) own use, benefit and behoof, the occupation, rents, issues, and profits of the above granted premises during my natural life." The Court considered that the fee passed to the grantee. The operation of the Statute of Uses was not alluded to; and if it had been, it would seem that taking the conveyance to operate by way of grant, (whatever might have been the case if it were to operate as a covenant to stand seized, or by way of bargain and sale), the use in favor of the grantor would still have been a use upon a use, and so unexecuted by the statute, and a mere trust. This case therefore, does not conflict with what is stated in the text.

(c) See *Simpson v. Hartman*, supra.

(d) Ante note a.

the clause as to possession would still be evidence of a tenancy at will: and if there be an attornment clause in the mortgage under which the tenant is to pay interest as rent, and occupation subsequently by the mortgagor, the position of landlord and tenant will be created, and the mortgagee can distrain (*a*): nor would it seem to be necessary for such purpose that rent should theretofore have been paid *qua* rent (*b*): probably also, if rent were paid *qua* rent, with reference to a year or aliquot part of a year, and there were nothing in the mortgage shewing that a tenancy at will only were intended, a tenancy from year to year would be created (*c*).

If the mortgage be to a married woman (as is now not uncommon since Con. Stat. ch. 73), then it would seem that there should be a certificate of her examination, and that her husband should be a party, as required by Con. Stat. ch. 85, in order that the clause giving to the mortgagor right to possession till default, should operate to create a term in his favor, unless as above suggested, the term can be executed by way of use.

Possessory right of mortgagor on mortgage to married woman who is not examined under Con. St. cap. 85.

If the mortgagor be tenant at will to the mortgagee an assignment or sub-lease by the mortgagor does not *per se* without notice to the mortgagee determine the tenancy (*d*). The position of a tenant of a mortgagor, himself tenant at will to the mortgagee, seems to be involved in some obscurity; as a general rule the lessor being reversioner can treat the tenant of a tenant at will as a trespasser; but there is a case (*e*) "which goes so far as to shew that a mortgagor in possession, who is not treated by the mortgagee as a trespasser may confer on his lessee the legal possession, although the mortgage was in fee" (*f*).

Sub-lease by a mortgagor tenant at will.

(*a*) West v. Fritche, 3 Ex. 216; Morton v. Woods, L. R. 3 Q. B. 658; Royal Canadian Bank v. Kelly, 19 C. P. U. C. 196, ante p. 381.

(*b*) Per Blackburn, J., in Morton v. Woods, *supra*.

(*c*) Richardson v. Langridge, 1 Tudor Lg. Ca. 2 ed. p. 20, *in notis*; see also, ante p. 59.

(*d*) Pinhorn v. Souster, 8 Ex. 763. Melling v. Leak, 16 C. B. 652, 669. Richardson v. Langridge 1 Tud. Lg. Cases 2 ed. 18

(*e*) Doe d. Higginbotham v. Barton, 11 A. & E. 307.

(*f*) James v. McGibney, 24 Q. B. U. C. 158 per Draper, C. J. See also Evans v. Elliott, 9 A. & E. 342, per Ld. Denman, C. J.

Mortgagee
and tenants of
the mortgagor,
after the
mortgage,

no privity
between them.

The mortgagee may however, by recognizing the possession of the tenant of the mortgagor preclude himself from being able to treat him as a trespasser; and it is said he becomes tenant to the mortgagee on payment to him of the rent reserved by the mortgagor (a). But it would seem that the mere receipt of interest by the mortgagee from the mortgagor will not amount to such recognition (b). The mortgagee cannot without some assent of such tenant, express or implied, constitute him his tenant, and cause him to hold of him the mortgagee; and without such assent evidencing a new tenancy between the mortgagee and the tenant, no privity of estate exists between them, and the mortgagee would not, as in the case of a tenant before mortgage, have the rights and remedies of the mortgagor to the rent (c). It is said "that in order to create a tenancy between the mortgagee and the tenant let into possession by the mortgagor, there must be some evidence whence it may be inferred that such relation has been raised by mutual agreement, and that in such case the terms of the tenancy are to be ascertained (as in an ordinary case) from the same evidence which proves its existence: and where the tenant does consent to hold under the mortgagee, a new tenancy is created, not a continuation of the old one between him and the mortgagor" (d). It would seem however, that the consent must be of a particular

(a) *Keech v. Hall*, 1 Smith, Lg. Ca. 6 ed. pp. 526; *Moss v. Gallimore*, Ib. 568; *Doe d. Whitaker v. Hales* 7 Bing. 322.

(b) *Doe d. Rogers v. Cadwallader*. 2. B. & Ad. 473; see however, *Evans v. Elliott*, 9 A. & E. 342, per Denman, C. J.

(c) *Evans v. Elliott*, 9 A. & E. 342; *Partington v. Woodcock* 6 A. & E. 690, per Patteson, J.

(d) *Moss v. Gallimore*, 1 Smith Lg. Ca., in *notis* 6 ed. p. 570. Of what nature would be the new tenancy between the mortgagee and tenant? For instance, if the demise from the mortgagor were by deed having more than three years to run with covenants to repair, or cultivate in a particular mode, and all that passed between the mortgagee and the tenant was a verbal consent under threat of eviction to hold of the mortgagee, on payment of the rent reserved by the old lease, it would seem that at most this could not create a greater interest than from year to year; per Cockburn C. J., *Carpenter v. Parker*, 3, C. B. N. S. 235. If so, would the terms of the old lease as to repairs and cultivation govern and be incorporated into the new tenancy? See ante p. 60, n. a.

nature to create such new tenancy, at least to have the effect of absolving the tenant from liability to pay the rent reserved on the lease to him from the mortgagor, when the same has not been actually paid under some constraint to the mortgagee, and that mere consent alone to hold of the mortgagee will not have this effect. Thus *mere notice* by the mortgagee to the tenant will be no defence to an action by the mortgagor either for rent due before or after the notice.

How by act of mortgagee the tenant may be absolved from liability to mortgagor.

The ordinary principle as regards a tenant is that he must pay rent, or for use and occupation, to the person from whom he took, and cannot deny his landlord's right short of eviction, or what is tantamount to eviction, by title paramount to the landlord; or payment under constraint of paramount charges as rent charges, or other claims issuing out of the land (*a*). Applying these principles to the case of the mortgagor's tenant on demise after mortgage, then it is clear if the tenant be rightfully evicted by the mortgagee and let into possession again on a new agreement between him and the mortgagee, that the old lease ceases: so also it would seem to be, (though it is by no means clear), if there be only a constructive eviction, as for instance a threat to evict, coupled with an attornment to the mortgagee as his tenant (*b*). And though there have been no eviction, either actual or constructive, and no attornment or new tenancy created between the mortgagee and the tenant, still payment to the former under constraint in discharge of his claims, will be a good defence by the tenant in an action for the rent by the mortgagor (*c*). But as before mentioned, *mere notice* by the mortgagee to the tenant will not absolve the tenant from liability to his lessor for past or future rent; and there has been some question as to whether notice from the mortgagee, though coupled

(a) Notes to *Lampleigh v. Braithwait*; 1 Smith Lg. Ca., 6th ed. p. 156.

(b) *Doe d. Higginbotham v. Barton*, 11 A. & E. 315. *Mayor of Poole v. Whitt*, 15 M. & W. 571; but see the judgments in *Delaney v. Fox*, 2 C. B. N. S. 768; *Carpenter v. Parker*, 3 C. B. N. S. 237.

(c) *Johnson v. Jones*, 9 A. & E. 809. See also *Murdiff v. Ware*, 21, Q. B. U. C. 68.

with payment of the rent, is any defence to an action by the mortgagor if the rent were overdue before notice given (a).

Position of mortgagee and tenant of mortgagor on demise before mortgage.

So far as regards tenants on a demise from the mortgagor prior to the mortgage, the mortgagee, subject to the effect of the usual proviso that till default the mortgagor may remain in possession, or receive the rents and profits, occupies the ordinary position of assignee of the reversion on a lease, and has the same, rights, remedies and liabilities as regards the lessee. Attornment by the tenant to the mortgagee is not requisite, and until the mortgagee interferes with the tenancy the tenant is safe in paying the rent to the mortgagor (b).

Right of mortgagor to the rents.

It not unfrequently happens that the mortgagee permits the mortgagor to receive the rents, and does not in any way interfere with the tenancy, and that the tenant omits to pay rent to either, the question then arises, how the mortgagor can enforce payment. It is clear that where there is *no subsisting re-demise* to the mortgagor, and the mortgagee is the reversioner, that the mortgagor is not entitled to sue or distrain in his own name, and so no proceedings can be had unless in the name of the mortgagee: recent cases go to shew that under such circumstances as above, the mortgagor is "*presumptione juris* authorized," "if it should become necessary, to realize the rent by distress, and to distrain for it in the mortgagee's name, and as his bailiff" (c). It is to be observed that those cases however, were cases in which there was no re-demise in the mortgage to the mortgagor, and from all that appears in them, there was no right to possession in the mortgagor. In any case in which there should be a lease at a rent, and then the lessor should mortgage his reversion with a re-demise to himself, then it

(a) *Wilton v. Dunn*, 17, Q. B. 295: see also per Hagarty, J., in *Fairbairn v. Hilliard*, 27 Q. B. U. C. 111, and *Waddilove v. Barnett*, 2 Bing. N. C. 538.

(b) 4 Anne, c. 16, s. 10; *Trent v. Hunt*, 9 Ex. 23., per Alderson, B.

(c) *Trent v. Hunt*, 9 Ex. 24, per Alderson B.; *Snell v. Finch*, 13 C. B. N. S. 651; see also the *Dean of Christchurch v. Duke of Buckingham*, 17 C. B. N. S. 391, per Willes, J.

would seem that during the subsistence of such re-demise, and the consequent right of the mortgagor to the pernancy of the profits, any distress for rent due from the tenant during such subsistence, should be by the mortgagor and in his name only. He would appear then to be the reversioner, not indeed of the whole reversion, but of part, and so entitled to the rent and to distrain. If A seized in fee demise for a thousand years at a rent, and pending the lease, demise to B for five years, B becomes reversioner and entitled to the rent as to the first lease during the term granted to him, and instead of enjoying the possession of the land, he takes the rent (a). The position of B the second lessee, and of the mortgagor, in the case above put, appear in principle identical.

To every assignment of a mortgage, the mortgagor, if possible, should be a party; if not a party, he should at least recognize the existence of the mortgage debt, and if the mortgagee be in possession, assent to the transfer (b). The object of the mortgagor being made to recognize the mortgage debt as subsisting, arises from the fact that the assignee takes subject to all the equities and settlement of accounts between the mortgagor and mortgagee. Thus, if nothing were ever due on the mortgage, or it were obtained by fraud and without consideration, an assignee, though for value and without notice, would stand in no better position than the mortgagee (c). But where an insolvent person gave a mortgage to his son for a thousand dollars, which sum was composed in part of six hundred dollars not due from the mortgagor, but fraudulently inserted as due, though the mortgage was held fraudulent and void *in toto* against creditors, yet it was considered that an assignee might claim the benefit of a purchase for value without notice (d). Whatever also the mortgagor could claim as a deduction from the mortgage debt, by

Assignment of mortgage, mortgagor should join in,

assignee takes subject to equities between mortgagee and mortgagor.

(a) Preston on Conv., vol. 2, 145; Co. Litt. 215 a.; Harmer v. Bean, 3 Car. & Kir. 307.

(b) See post, p. 398, n. c.

(c) McPherson v. Dougan, 9 Grant, 258.

(d) Totten v. Douglas, 15 Grant, 126.

Assignee takes subject to equities up to time of notice of assignment.

Notice by registry.

Importance of assent by mortgagor to assignment.

Covenant for title on assignment.

Mortgages of leaseholds, when they should be by assignment or under lease.

reason of payment or set off, will be allowed as against the assignee, who can stand in no better position than the mortgagor. This rule will continue to apply even after transfer until the mortgagor have notice of the assignment; and any payments made to the mortgagee (a), or it would seem, even set-off accrued against him, (b), though after transfer, without notice thereof, and under the impression that he still held the mortgage, would be allowed against the assignee. Nor would it make any difference that payments were made, and were unindorsed as such on the mortgage, and that the mortgage moneys were not then payable. Hence the necessity of inquiry at least, prior to assignment, and of notice to the mortgagor of any transfer, in case he does not become a party to the assignment. It would seem that under sec. 66 of the Registry Act registry of the assignment would not be notice to the mortgagor, as that section only constitutes registry of instruments notice to those claiming *an interest subsequent* to such registry.

The assent to the transfer where the mortgagee is in possession may be of importance in some cases; for, as before explained, a mortgagee in possession is liable to account for rents and profits, and chargeable also for loss to the mortgagor's estate through his wilful default, and as he occupies somewhat the position of a trustee for the mortgagor, if he assign, without assent of the latter, and deliver possession, he will continue responsible on default by the assignee (c).

On an assignment of a mortgage, or on sale under a power of sale, the only covenant for title to the land that the mortgagee can be required to give is that against his incumbrances.

The character of a mortgage of leasehold property must depend much on the nature of the lease; if the rent be of less amount than the annual value of the property, and the

(a) McDonough v. Dougherty, 10 Grant, 42; Engerson v. Smith, 9 Grant, 16.

(b) Galbraith v. Morrison, 8 Grant, 289.

(c) Ante p. 485, n. c.; 1 Eq. Ca. Ab. 328, pl. 2.

covenants binding on the assignees (*a*) be not too onerous, then it is better to have the mortgage by way of assignment than underlease. This is advisable because if the mortgage be by way of underlease, which leaves a reversion in the mortgagor, he may perhaps by non-observance of some covenant in the original lease giving right of re-entry to the lessor, forfeit the lease; whereas if the mortgage be by way of assignment of the whole estate of the lessee, no such danger is incurred. It is manifest also that this danger considerably depreciates the value of the security to the mortgagee, as being among other things likely to affect the price on any sale under the power of sale in the mortgage. If however the rent be large and the covenants binding on the assignees of a burdensome nature, or such as the mortgagee might not wish to assume, as for instance a covenant to repair from which destruction by fire is not excepted, then he may have to rest satisfied with an underlease: for if he take an assignment he would during the continuance of his estate, be liable for the rent and the performance of such covenants; and that even though he should never enter (*b*): and it would seem even though he should not be entitled to enter; as where the mortgage should give right to the mortgagor to remain in possession till default in payment of interest or principal, and the interest should be punctually paid. Of course the head landlord could distrain on goods on the premises on non-payment of his rent; but he might lie by allowing arrears to accumulate, and ultimately sue the assignee for all arrears due during the time he was assignee (*c*): hence the necessity, if the mortgagor is to remain in possession, of providing in the mortgage that he pay the rent to the head landlord, and of ascertaining that it be paid.

A mortgage by way of sub-lease is usually for the whole term less a day; this prevents any privity of estate between the mortgagor and the mortgagee. Mortgage by sub-lease.

(*a*) As to what covenants are binding on assignees. *Spencer's case*, 1 Smith Lg. Ca. 6 ed. 45; *Western v. Macdermot*, L. R. 1 Eq. 499; *Wilson v. Hart*, L. R. 1 Cha. App. 463. Ante p. 5.

(*b*) *Jones v. Todd*, 22 Q. B. U. C. 37; *Cameron v. Todd*, ib. 390; 2 Err. & App. Rep. 434.

(*c*) See a case of this nature, note *b. supra*.

Mortgage by
sublease.

tween the mortgagee and the original lessor, so that the former is not liable for rent or on covenants in the original lease. The reversion though only of one day left in the mortgagor exposes the mortgagee to the danger of forfeiture, and decreases the value of the security as above explained; but the decrease in value may be partially obviated, as it always should be, by a declaration in the mortgage that the mortgagor his executors, administrators and assigns will on any sale by the mortgagee, &c., under the power of sale stand possessed of and interested in the reversion in trust for the purchaser and to assign and dispose of the same as he shall direct. After a sale and conveyance of the term to a purchaser, he need not under such a declaration obtain an assignment to *himself*, because in that case as the term and the reversion immediately expectant thereon would meet in the same person, the term though for a longer period than the reversion would still be merged in it as being a higher estate, and thus the purchaser then stands in the position of *assignee* of the original lessee, and so liable on covenants running with the land which it was originally intended to avoid by the mortgage being by way of sublease. If therefore the purchaser is unwilling to assume the responsibility of the covenants, and at the same time wishes to avoid any danger of the mortgagor committing some act which would forfeit the lease, he might obtain an assignment to a trustee for him of the mortgagor's reversion (a).

(a) The forms are that the mortgagor shall convey his reversion as the purchaser shall direct, the object being that as mentioned in the text the purchaser may either take an assignment to himself, or avoid liability on the covenants by procuring an assignment to a trustee. It may be said however, the purchaser does not thereby escape liability, as he would be bound to indemnify his trustee against loss. Still the pecuniary position of the person selected as trustee might not be such as that he could suffer loss, and if he suffered no actual loss, he might be satisfied not to call on his *cestui qui trust* to relieve him. The propriety of such a course it is for the parties adopting it to consider. That such an assignment is not to be deemed fraudulent, so as to be vacated by the lessor, see Woodfall L. & Tenant, 9 ed. 241, 8 ed. 229; Rowley v. Adams, 4 My & Cr. 534; The mortgagor might also, if he were the original *lessee* and so always liable after assignment on his covenants, reasonably object to assign to a person who could not indemnify him against non performance of his covenants; but if he were an assignee, such objection would not hold, as after assignment his liability ceases.

The law on the subject of equitable mortgages by deposit of title deeds depends much on the Registry Acts, and under these the law varies.

The act of 29 Vic. ch. 24, had provisions similar to sections 67 & 68 of 31 Vic. ch. 20, which repealed the former act, the language of which sections is as follows :—

Section 67. Priority of registration shall in all cases prevail unless before such prior registration there shall have been actual notice of the prior instrument by the party claiming under the prior registration.

Section 68. No equitable lien, charge or interest affecting land shall be deemed valid in any Court in this Province after this act shall come into operation, as against a registered instrument executed by the same party, his heirs or assigns, and tacking shall not be allowed in any case to prevail against the provisions of this act.

As sec. 68 has been held not to be retrospective or apply to equities subsisting before its enactment (a), it will be requisite to consider the old law in reference to equitable mortgages by deposit of title deeds.

Under the law as it existed prior to the act of 29 Vic., an equitable right or interest incapable of registry was not liable to be defeated by mere force of the registry act; in fact the case was not within the act (b): therefore a mortgage created by *mere deposit* of title deeds, could not be postponed by mere registry of another instrument. There is however sometimes difficulty in determining how far the equitable mortgage may be incapable of registry so as to be within the protection of this rule, in those cases where a written memorandum accompanies the deposit. A distinction has been made between those cases wherein the memorandum was a wholly executed agreement, and those wherein it was executory containing an agreement by the mortgagor to do something further towards perfecting the security.

(a) McDonald v. McDonald, 14 Grant, 133.

(b) Moore v. Bank, B. N. A., 15 Grant, 308, and cases there referred to; see this case in Appendix.

The former might perhaps require to be registered, but certainly not the latter (a).

How far
absence of
title deeds is
constructive
notice of
an equitable
mortgage by
deposit under
the old law.

Moore v. Bank
B. N. A.

If the legal estate were acquired by a second mortgagee or purchaser for value without notice, then the equitable mortgage fails. The question however arises as to what is notice, whether the absence of the title deeds and of enquiry for them is constructive notice, and how far constructive notice would suffice under the old law to preserve the priority of the equitable mortgage.

In *Moore v. Bank of British North America* (b) it was considered that possession, prior to the act of 29 Vic., under a parol contract to purchase, there being no wilful or fraudulent abstaining from enquiry, was not sufficient constructive notice to take the case out of the old registry law in favor of the possessor, notwithstanding decisions in England and Ireland to the contrary. Still it may be that where a claimant subsequent to the equitable mortgage, who insists on priority under the old registry law, has made no enquiry for the title deeds, or received no reasonable excuse for their non-production, that subject to the question before referred to of necessity of registry of the memorandum of deposit, if any, the absence of such enquiry or excuse is constructive notice sufficient to deprive the claimant of the benefit of his prior registry: that such conduct might also bring the case within that class of cases referred to by Mowat, V. C. (c), as tantamount to actual notice or positive fraud, and, especially if coupled with other even slight circumstances, that the court would be "satisfied from the evidence that the party charged had designedly abstained from enquiring for the very purpose of avoiding notice" (d). In England this question has

(a) *Harrison v. Armour*, 11 Grant, 303; *Wright v. Stanfield*, 27 Bea. 8; *Moore v. Culverhouse*, 27 Bea. 639; *Sug. V. & P.*, 14 ed., 727; *Moore v. Bank B. N. A.*, 15 Grant, 308, and cases there cited; see this case in Appendix hereto.

(b) 15 Grant, 308, see this case in Appendix and cases there cited, as to notice and priorities; also *Chadwick v. Turner*, L. R. 1, Ch. App. 310, and *Foster v. Beall*, 15 Grant, 244.

(c) *Moore v. Bank B. N. A.*, *supra*, pp. 318, 319.

(d) *Jones v. Smith*, 1 Hare, 55; *Sug. V. & P.* 14 ed. pp. 783, 784.

been expressly decided against the claimant guilty of such laches (a).

The next question is, how far the law is varied by the present act and that of 29 Vic., which on this point is identical with the present act: how far the equitable mortgagee, having no memorandum of deposit capable of registry, is deprived of his priority where the person seeking to deprive him of it by force of the act has actual notice, or constructive notice of the character before referred to as tantamount to fraud or actual notice; as for instance, where he should have said on acquiring his interest, he would prefer not to be told anything as to the title deeds. Whether also sec. 68 of the present act extends only to registered instruments whereon *value* is given.

The present registry law as to mortgages by deposit of deeds.

Sec. 67 would not seem to apply in such case, as the equitable mortgagee has no "instrument" of which notice can be had. It has been said in a recent case (b) that the questions above referred to "may have hereafter to be carefully considered and to be decided," and the author abstains therefore from doing more than calling attention to them. It may be urged in favor of immateriality of notice, that the provision in sec. 53 of the former registry act (Con. Stat.), expressly saving the rights of equitable mortgagees, is expunged in this act; that if the doctrine of notice is to prevail, then this section works no change in the law; that in the next prior section (67), "actual notice" is expressly referred to, and that the doctrine of notice prevailing under the registry law has been regretted (c). As the question extends to all equitable liens, charges and interests, it cannot fail shortly to receive the light of judicial decision.

(a) *Wormald v. Maitland*, 13 W. R. 832; see also *Re Allen*, Irish Rep. 1 Eq. 455: but that mere constructive notice will not suffice, and in disapproval of *Wormald v. Maitland*, see *Russell v. Cashel*, Trin. T. 1867, in Ireland, before Brewster, C.

(b) *McDonald v. McDonald*, 14 Grant, 133.

(c) See Rt. Prop. Commissioners 2nd Rep., Bills, 1830-31, Vol. 2, p. 297, No. 85; also 2nd Rep. pp. 35, 40, and the Imp. Act. 13 & 14 Vic. ch. 72, founded on the Report; see also *Wyatt v. Bandell*, 19 Ves. 439, per Sir W. Grant; *Ford v. White*, 16 Bea. 120, 123, 124.

Consolidation
of securities,
taking.

The following remarks in a recent case (a) will illustrate the law on the subject of consolidation of securities. "When one gives two mortgages for separate debts on distinct properties, if both mortgages are given to the same person, or become vested in the same person, the rule (independently of the registry law) is, that the mortgagor is not entitled to redeem the one mortgage without also redeeming the other; so that in effect, the holder of the two mortgages obtains a security on the property comprised in each mortgage, not only for the debt therein mentioned, but also for the debt mentioned in the other mortgage. This doctrine has been settled by a long series of binding decisions, commencing with a very early date; and the principle on which the doctrine was established was thus stated by the Lord Chancellor in *Willie v. Lang* (b). 'Every mortgagee when the mortgage is perfected, has acquired an absolute legal estate. Upon what terms can the court proceed to a redemption? By giving the mortgagee the value of his money, its fruit and his costs, and upon these terms only; for it is obvious injustice to help to the restitution of the pledge, without a full restitution of what it is first pledged for. If a person makes two different mortgages of two different estates, the equity reserved is distinct in each, and the contracts are separate; yet if the mortgagor would redeem one, he cannot; because, if you come for equity, you must do equity; and the general estate being liable for both mortgages, this court will not be an instrument to take illegally from a mortgagee, that by which he will be defrauded of part of his debt. If you come to redeem separately, you come for equity without doing equity; paying a debt, in lieu of which the mortgagee can hold both your estates until this court interposes (c). Learned judges have occasionally intimated some dislike of the rule (d),

(a) *Buckler v. Bowman*, 12 Grant, 457; see also *Hyman v. Roots*, 10 Grant, 340; *Beavor v. Luck*; L. R. 4 Eq. 537. (b) 2 Ed. 79.

(c) Vide *Fisher on mortgages*, secs. 689, 690; *Tassil v. Smith*, 2 DeG. & J. 714; *Selby v. Pomfret*, 1 Johns and Hare, 336.

(d) But see *Sober v. Kemp*, 6 Hare, 158.

but they have uniformly acknowledged it to be the law of the court" (a).

This being so, and every one being presumed to know the law, persons dealing with a mortgagor after both mortgages have been given, are deemed so to deal "with knowledge that the two mortgages on the two estates, though then belonging to different mortgages might coalesce, and with knowledge of the possible consequences of their coalition" (b). And such persons therefore, by taking a subsequent conveyance or mortgage of one of the properties, take it subject to the chance of the holder of the prior mortgage thereon, uniting with it any mortgage that the mortgagor may theretofore have given on any other property. To be safe, one who negotiates for a subsequent mortgage or purchase of any property, has thus to ascertain not only what prior mortgages there are on such property, but also what security the mortgagor has outstanding on other properties, unless he is himself prepared to buy up the prior mortgage on the property respecting which he is negotiating, or can secure himself against such prior mortgage being parted with by the holder (c).

The right to tack seems to be distinct from the right to consolidate (d), and it may well be that although the former is abolished the latter is not.

Right to tack distinct from right to consolidate. The former abolished.

Under the former registry act, it was held that the right to consolidate continued, notwithstanding the language of section 56, reciting that tacking had been found productive of injustice, and giving priority according to time of registration; it was remarked however, that tacking was not in express terms abolished. Under the recent act, however, tacking is expressly abolished.

The right to tack to the mortgage debt, as against the heirs of the mortgagor, all arrears of interest recoverable

Tacking interest 6 years overdue.

(a) *Treson v. Denie*, 2 Cox, 425; *Vint v. Padget*, 2 DeG. & J. 613; *Tassel v. Smith*, ib. 345; *Hyman v. Roots*, 10 Grant, 345.

(b) *Vint v. Padget*, 2 DeG. & J. 613; *Beevor v. Luck*, Lk. 4 Eq. 537.

(c) 1 J. & Hem, 336; *Hyman v. Roots*, 10 Grant, 340.

(d) *Fisher on Mortgages*, p 388; *Buckler v. Bowman*, 12 Grant, 462, supra.

on the covenant of the mortgagor, though more than six years due, is before referred to (a).

27 & 28 VIC. CH. 31.

AN ACT RESPECTING SHORT FORMS OF MORTGAGES IN UPPER CANADA.

[Assented to 30th June, 1864.]

Preamble. Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :

Where words of column one of the second Schedule are employed, the mortgage to have the same effect as if the words in column two were inserted.

1. When a mortgage of real property in Upper Canada, made according to the forms set forth in the first schedule to this Act, or any other such mortgage expressed to be made in pursuance of this Act, or referring thereto, contains any of the forms or words contained in column one of the second schedule to this Act, and distinguished by any number therein, such mortgage shall be taken to have the same effect, and be construed as if it contained the form of words contained in column two of the same schedule, and distinguished by the same number as is annexed to the form of words used in such mortgage ; but it shall not be necessary in any such mortgage to insert any such number.

Mortgages not taking effect under this Act how far valid.

2. Any such mortgage or part of such mortgage which fails to take effect by virtue of this Act shall, nevertheless, be as effectual to bind the parties thereto, so far as the rules of law and equity will permit, as if this Act had not been made.

Mortgage to include all houses &c., and the reversion, and all the estate, &c., of the grantor.

3. Every such mortgage, unless an exception be specially made therein, shall be held and construed to include all houses, out-houses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, under-woods, mounds, fences, hedges, ditches, ways, waters, water-courses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever to the lands therein comprised belonging, or in any wise appertaining, or with the same demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof, and if the same purports to convey an estate in fee, also the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits of the same lands, and of every part and parcel thereof ; and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever

(a) p. 386.

4. In the construction of this Act and schedules thereto, unless there be something in the subject or context repugnant to such construction the word "lands" shall extend to all freehold tenements and hereditaments whether corporeal or incorporeal or any undivided part or share therein respectively; and the word "party" shall mean and include any body politic, corporate, or collegiate, as well as an individual.

Remuneration for mortgage under this Act not to be taxed according to length only.

6. The schedules and the directions and forms therein contained, shall be deemed parts of this Act.

THE FIRST SCHEDULE.

In witness whereof the said parties hereto have hereunto set their hands and seals.

Directions as to the forms in this schedule, in cases of mortgage of real property :

- Digitized by Google

schedule, may substitute for the words "Mortgagor or Mortgagors," or "Mortgagee or Mortgagees," any name or names; and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in any of the forms in the first column of this schedule; and corresponding changes shall be taken to be made in the corresponding forms in the second column.

3. Such parties may introduce into, or annex to any of the forms in the first column, any express exceptions from or other express qualifications thereof respectively; and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.

COLUMN ONE.

1. And the said (*A.B.*) wife of the said Mortgagor hereby bars her dower in the said lands.

2. PROVIDED. — This mortgage to be void on payment of (*amount of principal money*) of lawful money of Canada, with interest at (*rate of interest*) per cent. as follows: (*terms of payment of principal and interest*)

COLUMN TWO.

1. And the said (*A.B.*) wife of the said mortgagor, for and in consideration of the sum of of lawful money of Canada, to her in hand paid by the said mortgagee, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted and released, and by these presents doth grant and release unto the said mortgagee, his heirs and assigns, all her dower and right and title which, in the event of surviving her said husband she might or would have to dower, in, to, or out of the lands and premises hereby conveyed or intended so to be.

2. Provided always, and these presents are upon this express condition, that if the said mortgagor, his heirs, executors, administrators or assigns, or any of them, do and shall, well and truly pay or cause to be paid unto the said mortgagee, his executors, administrators or assigns, the just and full sum of (*amount of principal money*) of lawful money of Canada, with interest thereon, at the rate of (*rate of interest*) per cent. per annum on the day and time, and in manner following, that is to say (*terms of payment of principal and interest*) without any deduction, defalcation or abatement out of the same, for, or in respect of any taxes, rates, levies, charges,

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and taxes and performance of statute labor.

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rents, assessments, statute labor or other impositions whatsoever already rated, charged, assessed or imposed, or hereafter to be rated, charged, assessed or imposed by authority of Parliament or otherwise howsoever, on the said lands and tenements, hereditaments, and premises, with the appurtenances, or on the said mortgagee, his heirs, executors, administrators or assigns, in respect of the said premises, or of the said money or interest, or any other matter or thing relating to these presents, and until such default as aforesaid, shall and will, well and truly pay, do and perform or cause or procure to be paid, done and performed all matters and things in this proviso hereinbefore set forth, then these presents, and everything in the same contained, shall be absolutely null and void.

3. The said mortgagor covenants with the said mortgagee.

3. And the said mortgagor doth hereby for him self, his heirs, executors and administrators, covenant, promise and agree to and with the said mortgagee, his heirs and assigns, in manner following, that is to say :

4. That the mortgagor will pay the mortgage money and interest, and observe the above proviso.

4. That the said mortgagor, his heirs, executors, administrators or some or one of them shall, and will well and truly pay or cause to be paid unto the said mortgagee, his heirs, executors, administrators or assigns, the said sum of money in the above proviso mentioned, with interest for the same as aforesaid, at the day and time and in manner above limited for payment thereof, and shall and will in everything, well, faithfully and truly do, observe, perform, fulfil and keep all and singular the provisions, agreements and stipulations in the said above proviso particularly set forth, according to the true intent and meaning of these presents, and of the said above proviso.

5. That the mortgagor has a good title in fee simple to the said lands.

5. And also, that the said mortgagor, at the time of the sealing and delivery hereof is, and stands solely, rightfully and lawfully seized of a good, sure, perfect, absolute and indefeasible estate of inheri-

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6. And that he has the right to convey the said lands to the said mortgagee.

(Printed as amended by 29 Vic. ch. 27.)

7. And that on default the mortgagee shall have quiet possession of the said lands.

8. Free from all incumbrances.

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tance, in fee simple of and in the lands, tenements, hereditaments, and all and singular other the premises hereinbefore described, with their and every of their appurtenances, and of and in every part and parcel thereof, without any manner of trusts, reservations, limitations, provisos or conditions, except those contained in the original grant thereof from the Crown or any other matter or thing to alter, charge, change, incumber or defeat the same.

6. And also, that the said mortgagor now hath in himself good right, full power and lawful and absolute authority to convey the said lands, tenements, hereditaments, and all and singular other the premises hereby conveyed or hereinbefore mentioned or intended so to be, with their and every of their appurtenances unto the said mortgagee, his heirs and assigns, in manner aforesaid, and according to the true intent and meaning of these presents.

7. And also, that from and after default shall happen to be made of or in the payment of the said sum of money in the said above proviso mentioned, or the interest thereof, or any part thereof, or of or in the doing, observing, performing, fulfilling or keeping of some one or more of the provisions, agreements or stipulations in the said above proviso particularly set forth, contrary to the true intent and meaning of these presents, and of the said proviso, then, and in every such case it shall and may be lawful to and for the said mortgagee, his heirs and assigns, peaceably and quietly to enter into, have, hold, use, occupy, possess and enjoy the aforesaid lands, tenements, hereditaments and premises hereby conveyed or mentioned or intended so to be, with the appurtenances, without the let, suit, hindrance, interruption or denial of him the said mortgagor, his heirs, or assigns, or any other person or persons whomsoever.

8. And that free and clear and freely and clearly acquitted, exonerated and discharged of and from

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9. And that the said mortgagor will execute such further assurances of the said lands as may be requisite.

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all arrears of taxes and assessments whatsoever due or payable upon or in respect of the said lands, tenements, hereditaments and premises or any part thereof, and of and from all former conveyances, mortgages, rights, annuities, debts, judgments, executions and recognizances, and of and from all manner of other charges or incumbrances whatsoever.

9. And also, that from and after default shall happen to be made of or in the payment of the said sum of money in the said proviso mentioned or the interest thereof, or any part of such money or interest or of or in the doing, observing, performing, fulfilling or keeping of some one or more of the provisions, agreements or stipulations in the said above proviso particularly set forth, contrary to the true intent and meaning of these presents and of the said proviso, then and in every such case the said mortgagor, his heirs and assigns, and all and every other person or persons whosoever, having, or lawfully claiming, or who shall or may have or lawfully claim, any estate, right, title, interest or trust of, in, to, or out of the lands, tenements, hereditaments and premises hereby conveyed or mentioned or intended so to be with the appurtenances or any part thereof by, from, under or in trust for him the said mortgagor, shall and will, from time to time, and at all times thereafter, at the proper costs and charges of the said mortgagee, his heirs and assigns make, do, suffer and execute, or cause or procure to be made, done, suffered and executed, all and every such further and other reasonable act or acts, deed or deeds, devices, conveyances and assurances in the law for the further, better and more perfectly and absolutely conveying and assuring the said lands, tenements, hereditaments and premises with the appurtenances unto the said mortgagee, his heirs and assigns, as by the said mortgagee, his heirs and assigns, or his or their counsel learned in the law, shall or may be lawfully and reasonably devised, advised or re-

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10. And also that the said mortgagor will produce the title deeds enumerated hereunder and allow copies to be made at the expense of the mortgagee.

11. And that the said mortgagor has done no act to incumber the said lands.

12. And that the said mort-

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quired, so as no person who shall be required to make or execute such assurances, shall be compelled for the making or executing thereof, to go or travel from his usual place of abode.

10. And also, that the said mortgagor and his heirs shall and will, unless prevented by fire or other inevitable accident, from time to time, and at all times hereafter, at the request and proper costs and charges in the law of the said mortgagee, his heirs or assigns, at any trial or hearing in any action or suit at law, or in equity or other judicature or otherwise as occasion shall require, produce all, every or any deed, instrument or writing hereunder written for the manifestation, defence and support of the estate, title and possession of the said mortgagee, his heirs and assigns of, in, to or out of the said lands, tenements, hereditaments and premises hereby conveyed or mentioned or intended so to be, and at the like request, costs and charges shall and will make and deliver or cause or procure to be made and delivered unto the said mortgagee, his heirs and assigns, true and attested or other copies or abstracts of the same deeds, instruments and writings respectively or any of them, and shall and will permit and suffer such copies and abstracts to be examined and compared with the said original deeds by the said mortgagee, his heirs and assigns.

11. And also that the said mortgagor hath not at any time heretofore made, done, committed executed, or wilfully or knowingly suffered any act, deed, matter or thing whatsoever whereby or by means whereof the said lands, tenements, hereditaments and premises hereby conveyed or mentioned or intended so to be, or any part or parcel thereof, are, is or shall or may be in any wise impeached, charged, affected or incumbered in title, estate or otherwise howsoever.

12. And also that the said mortgagor or his heirs shall and will forthwith insure, unless already in-

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gagor will insure the buildings on the said lands to the amount of not less than currency.

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sured, and during the continuance of this security keep insured against loss or damage by fire, in such proportions upon each building as may be required by the said mortgagee, his heirs or assigns, the messuages and buildings erected on the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, in the sum of _____ of lawful money of Canada, at the least, in some insurance office, to be approved of by the said mortgagee, his heirs or assigns, and pay all premiums and sums of money necessary for such purpose, as the same shall become due, and will on demand assign, transfer, and deliver over unto the said mortgagee, his heirs, executors, administrators or assigns, the policy or policies of assurance, receipt and receipts thereto appertaining, and if the said mortgagee, his heirs or assigns shall pay any premiums or sums of money for insurance of the said premises or any part thereof, the amount of such payments shall be added to the debt hereby secured and shall bear interest at the same rate from the time of such payments, and shall be payable at the time appointed for the then next ensuing payment of interest on the said debt.

13. And the said mortgagor doth release to the said mortgagee all his claims upon the said lands subject to the proviso.

13. And the said mortgagor hath released, remised and forever quitted claim, and by these presents doth release, remise, and forever quit claim unto the said mortgagee, his heirs and assigns, all and all manner of right, title, interest, claim and demand whatsoever, both at law and in equity of, unto and out of the said lands, tenements, hereditaments, and premises hereby conveyed or mentioned, or intended so to be, and every part and parcel thereof, so as that neither the said mortgagor, his heirs, executors, administrators or assigns, shall or may at any time hereafter have claim, pretend to, challenge or demand the said lands, tenements, hereditaments and premises, or

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any part thereof, in any manner howsoever subject always to the said above proviso; but the said mortgagee, his heirs or assigns, and the said lands, tenements, hereditaments and premises, subject as aforesaid, shall from henceforth forever hereafter be exonerated and discharged of and from all claims and demands whatsoever, which the said mortgagor, his heirs or assigns might or could have, upon the said mortgagee, his heirs or assigns, in respect of the said lands, tenements, hereditaments and premises, or upon the said lands, tenements, hereditaments and premises.

14. Provided, that the said mortgagee on default of payment for months, may on notice enter on and lease or sell the said lands.

14. Provided always, and it is hereby declared and agreed by and between the parties to these presents, that if the said mortgagor, his heirs, executors or administrators shall make default in any payment of the said money or interest or any part of either of the same according to the true intent and meaning of these presents, and of the proviso in that behalf hereinbefore contained, and calendar months shall have thereafter elapsed, without such payment being made (of which default, as also of the continuance of the said principal money and interest, or some part thereof, on this security, the production of these presents shall be conclusive evidence) it shall and may be lawful to and for the said mortgagee, his heirs or assigns, after giving written notice to the said mortgagor, his heirs or assigns, of his intention in that behalf, either personally or at his or their usual or last place of residence within this Province not less than previous, without any further consent or concurrence of the said mortgagor, his heirs or assigns, to enter into possession of the said lands, tenements, hereditaments and premises hereby conveyed, or mentioned or intended so to be, and to receive and take the rents, issues and profits thereof, and whether in or out of possession of the same, to make any lease or leases thereof, or of any part

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thereof as he shall think fit, and also to sell and absolutely dispose of the said lands, tenements, hereditaments, and premises hereby conveyed or mentioned, or intended so to be, or any part or parts thereof, with the appurtenances by public auction or private contract, or partly by public auction and partly by private contract, as to him shall seem meet, and to convey and assure the same when so sold unto the purchaser or purchasers thereof, his heirs and assigns, or as he, she or they shall direct and appoint, and to execute and do all such assurances, acts, matters and things as may be found necessary for the purposes aforesaid, and the said mortgagee shall not be responsible for any loss which may arise by reason of any such leasing or sale as aforesaid, unless the same shall happen by reason of his wilful neglect or default; and it is hereby further agreed between the parties to these presents, that, until such sale or sales shall be made as aforesaid, the said mortgagee, his heirs, executors, administrators, or assigns shall and will stand and be possessed of and interested in the rents and profits of the said lands, tenements, hereditaments and premises in case he shall take possession of the same, on any default as aforesaid, and after such sale or sales shall stand and be possessed of and interested in the moneys to arise and be produced by such sale or sales or which shall be received by the mortgagee, his heirs or assigns, by reason of any insurance upon the said premises or any part thereof upon trust in the first place to pay and satisfy the costs and charges of preparing for and making sales, leases or conveyances as aforesaid, and all other costs and charges, damages and expenses which the said mortgagee, his heirs, executors, administrators or assigns, shall bear, sustain or be put to for taxes, rent, insurances and repairs, and all other costs, and charges which may be incurred in and about the execution of any of the trusts in

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him hereby reposed, and in the next place to pay and satisfy the principal sum of money and interest hereby secured or mentioned or intended so to be, or so much thereof as shall remain due and unsatisfied up to and inclusive of the day whereon the said principal sum shall be paid and satisfied; and after full payment and satisfaction of all such sums of money and interest as aforesaid, upon this further trust that the said mortgagee, his heirs, executors, administrators or assigns, do and shall pay the surplus, if any, to the said mortgagor, his executors, administrators or assigns, or as he shall direct and appoint, and shall also, in such event, at the request, costs and charges in the law of the said mortgagor, his heirs or assigns, convey and assure unto the said mortgagor, his heirs or assigns, or to such person or persons as he shall direct and appoint, all such parts of the said lands, tenements, hereditaments and premises as shall remain unsold for the purposes aforesaid, freed and absolutely discharged of and from all estate, lien, charge and incumbrance whatsoever by the said mortgagee, his heirs or assigns, in the meantime, so as no person who shall be required to make or execute any such assurances, shall be compelled for the making thereof to go or travel from his usual place of abode; provided always, and it is hereby further declared and agreed by and between the parties to these presents, that notwithstanding the power of sale, and other the powers and provisions contained in these presents, the said mortgagee his heirs or assigns shall have and be entitled to his right of foreclosure of the equity of the redemption of the said mortgagor, his heirs and assigns, in the said lands, tenements, hereditaments and premises as fully and effectually as he might have exercised and enjoyed the same in case the power of sale and the other former provisos and trusts incident thereto had not been herein contained.

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15. Provided that the mortgagee may distrain for arrears of interest.

(Printed as amended by 29 Vic. ch. 27.)

16. Provided that in default of the payment of the interest hereby secured, the principal hereby secured shall become payable.

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15. And it is further covenanted, declared and agreed by and between the parties to these presents, that if the said mortgagor, his heirs, executors or administrators, shall make default in payment of any part of the said interest at any of the days or times hereinbefore limited for the payment thereof, it shall and may be lawful for the said mortgagee, his heirs or assigns, to distrain therefor upon the said lands, tenements, hereditaments and premises, or any part thereof, and by distress warrant, to recover by way of rent reserved, as in the case of a demise of the said lands, tenements, hereditaments and premises, so much of such interest as shall, from time to time, be, or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress, as in like cases of distress for rent.

16. Provided always, and it is hereby further expressly declared and agreed by and between the parties to these presents, that if any default shall at any time happen to be made of or in the payment of the interests money hereby secured or mentioned, or intended so to be, or any part thereof, then and in such case the principal money hereby secured or mentioned, or intended so to be, and every part thereof, shall forthwith become due and payable in like manner and with the like consequences and effects to all intents and purposes whatsoever, as if the time herein mentioned for payment of such principal money had fully come and expired, but that in such case the said mortgagor, his heirs or assigns shall, on payment of all arrears under these presents, with lawful costs and charges in that behalf, at any time before any judgment in the premises recovered at law or within such time as by the practice of equity relief therein could be obtained, be relieved from the consequences of non-payment of so much of the money secured by these presents, or

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17. Provided, that until default of payment the mortgagor shall have quiet possession of the said lands.

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mentioned, or intended so to be, as may not then have become payable by reason of lapse of time.

17. And provided also, and it is hereby further expressly declared and agreed by and between the parties to these presents, that until default shall happen to be made of or in the payment of the said sum of money hereby secured or mentioned, or intended so to be, or the interest thereof, or any part of either of the same, or the doing, observing, performing, fulfilling or keeping some one or more of the provisions, agreements or stipulations herein set forth, contrary to the true intent and meaning of these presents, it shall and may be lawful to and for the said mortgagor, his heirs and assigns, peaceably and quietly to have, hold, use, occupy, possess and enjoy the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, with their and every of their appurtenances, and receive and take the rents, issues and profits thereof to his own use and benefit, without let, suit, hindrance, interruption or denial of or by the said mortgagee, his heirs, executors, administrators or assigns, or of or by any other person or persons whomsoever lawfully claiming, or who shall or may lawfully claim by, from, under or in trust for him, her, them or any or either of them.

The Act 27 & 28 Vic. ch. 31, as to short forms of mortgages.

The forms given in the act respecting short forms of mortgages (27 & 28 Vic. ch. 31) differ occasionally from the most approved forms in England, and as they are at variance with some of the suggestions heretofore made, it may be requisite to consider them. The statute may be of service to the draftsman, and save expense in registry, but it is unfortunate that the all-important power of sale is not in better form, and attention must be paid to one or two inconsistencies, which will be presently pointed out.

Precautions as to varying the forms.

Great care is requisite if the short forms in column one are to be in any way varied from, to suit particular cir-

cumstances; the act provides that "parties may introduce into, or annex to any of the forms in the first column any express exceptions from or other express qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column"; if therefore the alteration made is not an exception or qualification within the above clause, then the particular covenant or clause will it would seem be without the act, and left to the ordinary meaning of the words used (a).

It may be questioned whether the act applies to leasehold interests, for though by a liberal construction the term "real property" in the first clause might include chattels real, if aided by the context in the act, the inference to be drawn from the context is the other way. The whole frame of the statutory form is applicable to a freehold interest only; in clause 4 the word "lands" is made to extend to freehold interests only; and there is the absence of any provision, as in the act relating to short forms of leases, that "where the premises are of freehold tenure the covenants shall be taken to be made with, and the proviso for re-entry apply to, the heirs and assigns of the lessor, and where of a leasehold tenure to his executors, administrators, and assigns." In strictness the term "real property" does not include personal property (b). It has been held also that leaseholds will not pass under a general devise of "real estate" unless aided by other words (c). Till decision to the contrary, it would be advisable not to apply the act to mortgages of leasehold.

The act does not apply to leaseholds.

Clause 2 it will be observed does not extend to performance of covenants, as for instance to keep up a life or fire insurance, and repay the mortgagee any premiums he may pay on default of the mortgagor. Inasmuch as this clause applies at most only to payment of taxes till default

Cl. 2 does not extend to default in covenants, its application as to taxes.

(a) See remarks on the act as to short forms of conveyances, ante p. 102.

(b) Williams Real Prop. 8 ed. p. 8.

(c) Swift v. Swift, 1 D. F. & J. 160.

in payment of principal or interest, it would appear that under none of the forms would the mortgagor be liable to the mortgagee for taxes, &c., after default. In requiring the mortgagor to pay assessments that may be imposed on the mortgagee in respect of the mortgage money or interest, it would seem to go too far; interest on mortgages being assessable by the Act of 32 Vic. ch. 36.

Clauses 3 & 4
covenants for
payments
should not be
to heirs.

Notwithstanding that by clauses 3 and 4 the covenant for payment is made to the mortgagee and *his heirs*, it is clear that the personal representatives will not be deprived thereby of their ordinary right to the moneys as being personally, or of the right to sue for them in their own names. Assuming that the interest conveyed is one of freehold, then the word "heirs" is, as regards all the other covenants, the appropriate word, as such covenants (including perhaps that for insurance) run with the lands and go to the heir.

Clauses 7, 14
& 17 conflict
as to right to
possession;
should be
varied.

Clauses 7, 14 and 17, conflict with each other as to the right of possession. Clause 7 gives the mortgagee right to possession in default of payment of principal or interest, and also apparently of taxes and statute labor: clause 14 gives the right only after default in payment of principal or interest, and then only after a certain written notice: clause 17 on the other hand, allows the mortgagor right to possession till default of payment of principal or interest, or in *observance of covenants*. Thus the right of the mortgagee to possession is more extensive under the general effect of the conveyance to him and of clause 17 negating his right to possession, than under the positive effect of clauses 7 and 14 giving him the right to enter. If these various clauses be used together without any modification, as it is probable they frequently will be, then it would seem that they may yet to a great extent be reconciled. Thus suppose the covenant to insure be inserted, and default be made therein by the mortgagor, whereon the mortgagee should bring ejectment: the mortgagor would contend that clauses 7 and 14, which give a right to the mortgagee to enter do not extend to breach of covenant, and that clause 14 requires written notice to be given before entry: the proper answer of the

mortgagee apparently would be, that the effect of the conveyance is to give him the immediate estate and right to possession; that such effect is controlled solely by clause 17 which allows the mortgagor possession only till breach of covenant; that there is no other clause giving possession any to the mortgagor, and consequently the general effect of the conveyance must govern; and so far as regards clauses 7 and 14, that they do not expressly negative any right the mortgagee otherwise has, nor do they positively confer any right to possession on the mortgagor; that clause 7 operates only as a covenant for quiet enjoyment against interruption, not to come into operation on default of the covenant to insure (to which it does not extend), but only on default in payment of the mortgage moneys, taxes or statute labor, and "in the meanwhile, though the mortgagee is equally to have power to enter and enjoy the land, yet he must content himself with his own title against interruption by strangers there being no covenant by the mortgagor to protect him during that period: whereas if he be disturbed after default in the covenant to insure he may have recourse to his remedy on the covenant" (a). Clause 14 is capable perhaps of a somewhat similar construction; at any rate it would seem that on breach of the covenant, the mortgagee might eject, though no default were made in payment of the mortgage moneys, taxes or statute labor.

Clause 9, being the covenant for further assurance, is made to operate only after default; in this respect it is "objectionable, as it might well happen that some act for further assurance might be required to be done before default" (b). It need hardly be mentioned that, so long at least as the equity of redemption subsists, the mortgagor cannot under this covenant be required to convey except subject to the proviso for redemption; nor can he be required after default to release his equity of redemption.

Cl. 9, objectionable as too limited.

(a) Doe d. Roylance v. Lightfoot, 8 M. & W. 553, in which case there was no right to possession given to the mortgagor, but the covenant for possession was that *after default* the mortgagee might enter, possess, &c.; the question was whether the mortgagee had right immediately on execution of the deed, or only after default—see ante p. 389.

(b) Davidson Convey. 2 ed. vol. 2, 579.

Cl. 10 should
not be adopt-
ed.

Clause 10, that the mortgagor will produce title deeds, is a clause which, without some explanation, might strengthen a practice unfortunately still too prevalent, viz., that the title deeds may be left in the hands of the mortgagor. This should never be permitted, if only (apart from other reasons) on the ground of the frequent impossibility of ever afterwards obtaining any production of the title deeds, and the consequent depreciation in the value of the property, and difficulty in carrying out a sale. When the mortgagor makes default, and the mortgagee proceeds to enforce his claim by foreclosure or sale, an hostility frequently springs up, and the mortgagor, so far from producing the title deeds, does all in his power to thwart the mortgagee. The remedy on the covenant will frequently be found useless, and when a foreclosure or sale has to be resorted to, the mortgagor is generally in such circumstances that, on a sale, any proceedings on the covenant to produce, only entail expense on the mortgagee, and on a foreclosure any order for delivery up of the title deeds might be of no avail. The Legislature never intended, by inserting this form of covenant, to sanction the practice of leaving the title deeds in the hands of the mortgagor. The form may be of service where the title deeds cover other property to be retained by the mortgagor and not included in the mortgage; or where the mortgagor has sold part of the property covered by the title deeds, and himself given his vendee a covenant to produce. Even in these cases a prudent mortgagee will obtain possession of the title deeds to himself, or at least to some trustee for both parties: when the mortgagor objects on the ground that the deeds cover other property, the mortgagee may himself offer to covenant to produce; and when the objection is that the mortgagor has covenanted to produce to a former purchaser, the mortgagee may urge that that covenant would also be binding on him during the continuance of his estate as running with the lands (a).

(a) Sugden Vendors, 14 ed. 453. It must not be supposed that the fact of a vendor having given a covenant to produce on sale of part of the

Clause 12. The nature of the covenant to insure has been already considered (a). It will be observed that the statutory form is framed rather to meet the case of a future than of an existing insurance. If at the time of the mortgage there be a policy of insurance, and the same be not actually assigned to the mortgagee, it may be questionable how far this clause will be of any avail to him as regards that specific policy, as the mortgagor only covenants to insure "unless already insured;" and so far as regards that part of the covenant which is to keep insured and assign the policy it may be contended it does not apply to the case of a policy existing at the time of the covenant, as the covenant contemplates a future policy in such proportions and in such office as the mortgagor thereafter may require (b).

Nothing is said in this form as to how the insurance moneys that may be paid on any loss are to be applied (c); clause 14, it is true, does provide to a certain extent for application of the moneys, but it would not reach the case of insurance moneys received before default by the mortgagor, but is apparently confined to the position of the mortgagee after sale under the power.

Clause 14 conferring the power of sale and providing for application of moneys is one which varies much from the modern approved forms. The objections will be understood from what has been before explained in treating of the power of sale (d). It conflicts apparently as regards right to possession with clauses 17 & 7 (e). It does not extend to breach of covenants as do clauses 17 & 7. The power

Cl. 12 as to insurance.

Cl. 14, the power of sale badly framed.

property, entitles him, on sale of the residue, to retain the title deeds to answer his covenant; in the absence of any contract on the subject, it would seem he will have to deliver them over to the purchaser of the residue, he can neither retain them or deliver them to the first purchaser. The vendor would however, in such a case be entitled to have the covenant recited in the conveyance of the residue, or endorsed on it, so as to create notice, and might fairly require a covenant from the purchaser to perform it: *Sugden Vendors*, 14 ed. 434.

(a) Ante p. 363.

(b) See 29 Vic. ch. 28, s. 7, ante p. 11.

(c) As to necessity for this see ante p. 366. *Austin v. Story*, 10 Grang. 306.

(d) Ante p. 373.

(e) Ante, p. 420.

Clause 14. should be given to the personal, not to the real representatives (a). It should especially not be dependant on notice, but the provision as to notice should be by a covenant by the mortgagee that notice shall be given; and the purchaser should be expressly relieved from any necessity as to seeing that notice was given (b). There is no power to the mortgagee to buy in at auction and re-sell without being responsible for loss or deficiency on re-sale (c); or to rescind or vary any contract of sale that may have been entered into: or to sell under special conditions of sale (d), (the latter however may be permissible when the conditions are not of a depreciatory character). The application of insurance monies is not sufficiently provided for (e); nor would they be received by the heirs (as assumed by the clause), but by executors, if payable to any representatives of the mortgagee. The surplus of sale should not be made payable exclusively to the personal representatives, for on sale after death of the mortgagor, the heirs are entitled to the surplus (f); in this respect the form might mislead the mortgagee to his prejudice. There is no clause relieving a purchaser from seeing that default was made, or notice given, or otherwise as to the validity of the sale; the importance and benefit of which to the mortgagee, and even to the mortgagor, was before alluded to (g). The provision that the giving the power of sale shall not prejudice the right to foreclose is unnecessary (h). It is perhaps to be regretted that a better form of power of sale had not been adopted (i).

(a) Ante p. 373.

(b) Ante p. 375.

(c) Jarman Byth. Con. by Sweet 3 ed, vol. 5, p. 567, n. b, and p. 412; see also ante p. 375 n. c.

(d) As to the object of these provisions, see p. 375 n. c.

(e) Ante p. 366.

(f) Ante p. 377.

(g) Ante p. 366.

(h) Jarm. Byth. Conv. by Sweet, 3 ed. vol. 5, p. 108.

(i) The very general practice now is to adopt the forms given by the statute, and in ordinary cases to fill up a printed form of mortgage. This is found to save both time and expense, especially now that all mortgages have to be prepared in duplicate, and registered in full. Where the parties desire to adopt a printed short form under the act, the practice of the author is to add a short proviso, that in case default be made in pay-

Clause 17. The inconsistency as to right to possession between this section and sections 7 and 14 has been before alluded to (a). It would seem that this section is not open to the objection of being invalid for the purpose intended ; viz., to operate as a redemise to the mortgagor; or of operating further than as creating tenancy at will. The nature of this objection has been fully explained (b) : it suffices here to say that the argument in favor of the objection would be, that, as the right of possession and demise to the mortgagor is till default in payment of principal, or interest, or *in observing covenants*, the demise is void for uncertainty as to the term of its duration. It is apprehended however, that though such objection would hold good if the right of possession were given only till default in observing covenants, and the covenants or any of them were uncertain in their nature as to the time of their performance or of breach, still, as in this section, a certain day is named for payment of principal, it will operate as a valid demise and creation of a term till that day, subject to be defeated in the meantime on non-observance of covenants or non-payment of interest (c).

Cl. 17, as to possession conflicts with clauses 7 & 14.

29 VIC., CH. 27.

AN ACT TO AMEND THE ACT RESPECTING SHORT FORMS OF MORTGAGES IN UPPER CANADA.

[Assented to 18th September, 1865.]

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :

1. The form of words numbered six in column number one of the second schedule of the Act, passed at the Session of the Par-

Schedule 2 of Act, 27, 28, V. c. 81 amended.

ment of either principal or interest for — months after the same is payable, the power of sale may be acted on without any notice, and that any contract of sale may be varied or rescinded, and the mortgagee, &c., may buy in and resell without being responsible for any loss or deficiency on resale. To this may be added, if thought proper, the clause before referred to relieving the purchaser from seeing that the events have happened on which a sale may be had, and as to regularity of the sale.

(a) Ante p. 420.

(b) Ante p. 389.

(c) Ante p. 389; and Royal Canadian Bank v. Kelly, 19 C. P. U. C. 196, ante p. 383.

liament of Canada, held in the twenty-seventh and twenty-eighth years of Her Majesty's Reign, chapter thirty-one, intituled: *An Act respecting Short Forms of Mortgages in Upper Canada*, is hereby amended, by substituting the word "Mortgagee" for the word "Grantee" therein.

Further amendment of the said Schedule. 2. The form of words numbered fourteen in column number two of the second schedule of the English version of the said Act is hereby amended by striking out the word "or" after the word "assigns" in the twenty-third line of such form of words, and substituting therefor the word "of."

Further amendment of the said Schedule. 3. The form of words numbered fifteen in column number one of the second schedule of the said Act, is hereby amended, by substituting the word "mortgagee" for the word "mortgagor" therein.

MEMORIALS AS EVIDENCE. (a)

The subject is treated of, 1st, as to the search requisite to let in secondary evidence; 2nd, how far a memorial executed by a grantor is evidence of the matters therein stated; 3rd, how far it is evidence if executed by a grantee; 4th, the distinction between the evidence furnished by a memorial in ejectment, and as between a vendor and purchaser, or under the act for quieting titles; and 5th, as to proof of execution.

1st. It frequently happens that secondary evidence of a missing document or title deed is rejected in consequence of the insufficiency of the search for the original.

Parties who search for a missing conveyance with a view to let in secondary evidence should bear in mind that the person entitled to the first immediate estate of freehold is the person entitled to retain the custody of the title deeds as against those entitled to ulterior estates in remainder or reversion; and that the deeds are presumed to follow the title and to go into the custody of those entitled (b). When the land descends to real representatives, they, and not the personal representatives, are entitled to the deeds, though for greater certainty a search with the latter would be advisable, especially in the case of a missing mortgage. The presumption that the deeds follow the title and go to him entitled may be destroyed; as for instance, by the fact that they covered other lands retained by the vendor (c); or that

As to search.

Owner of first estate of freehold entitled to the custody of title deeds as against those in remainder. Title deeds presumed to be in custody of those entitled to them.

How presumption destroyed. Sale by owner of part.

(a) The importance of this subject has induced the author to add this chapter, which in January, 1868, he published in the Upper Canada Law Journal.

(b) *Moriarty v. Grey*, 12 Ir. C. L. Rep. 141, per O'Brien, J.; *Sug. Vendore*, ch. 11, s. 4; see also *Marvin v. Hales*, 6 U. C. C. P. 211, post; but see *Sug. ch. 11, sec. 4, cl. 23*, as to the right to the deeds of the grantee or releasee to uses.

(c) *Yea v. Field*, 2 T. R. 708.

Covenant to produce by a former owner.

some prior owner on conveyance by him of a portion gave a covenant to produce. Where a vendor on sale of a part of his lands retains the deeds and gives a covenant to produce, it does not follow that on conveyance of the residue, the title deeds remain with him to answer his covenant to produce; on the contrary, it would seem that in the absence of stipulation, the vendee of the residue will be entitled to the deeds even against the prior vendee, and be bound by the covenant to produce as running with the lands (a). A learned Judge whose position before his elevation to the Bench was such as to have given him great practical experience, has expressed his recollection of the practice, however, as follows; "I think it used to be the practice, when the owner of a lot of land sold half of it, to retain the conveyance to himself; and in the event of his selling the other half, to give that conveyance to the purchaser of the second half (b)." This *dictum* had no reference to the vendor having on the first sale given a covenant to produce, and was by way of suggestion to the parties as to further search for a missing conveyance, of which no evidence other than a memorial signed by the grantee was given. On sale of part of the estate in lots without any stipulation as to the deeds, the holder of the portion of the highest value is entitled to the custody, whether seller or purchaser, giving the other a covenant to produce (c). Of joint owners or tenants in common, coparceners and joint tenants, whichever of them obtains possession of the deeds is entitled to retain them, and the presumption would be that they would go to the grantee or heir at law of the possessor, except in the case of joint tenants, whose heir at law would not be entitled.

Joint owners, who entitled to title deeds.

Search by the party to the cause among his own papers, how made.

Where the instrument, if subsisting, should be in possession of the party himself to the cause, who desires to give secondary evidence, the proper course is that he should search

(a) Ante, p. 422, n. a.

(b) *Wishart v. Cook*, 15 Grant, 237.

(c) *Sugden Vendors*, ch. 11, s. 4, cl. 4.

with a witness, and that the search should be "so conducted and in such places as to afford a reasonable ground for concluding that it was made *bona fide*, both as regards the witness and as regards the party, by giving and using all possible facilities for making it effectual." If he should himself have searched accompanied by a witness, but the witness should have made no search, and have accepted the statement of loss of such party as true, the search will not be sufficient (a).

It may sometimes be that as against a person claiming the freehold mere notice to him to produce may suffice, without evidence of search, on the presumption above referred to, that the deeds follow the title and are in the possession of the party to whom notice is given (b); for search would be useless with prior owners when the law would presume the title deeds were not with them, but passed from each prior owner to his grantee. That notice to produce alone should suffice, there must be nothing to destroy the presumption that the deed followed the title, as, for instance, a covenant to produce given by a prior owner.

On a question of sufficiency of search, and proof of loss to let in secondary evidence, Richards, C. J., in a recent case (c) expressed himself as follows: "In *Reg. v. The Inhabitants of Kenilworth* (d), Lord Denman, in reference to a general rule established as to what is established as to what is a sufficient search to let in secondary evidence said, 'I think that no general rule exists. The question in every case is whether there has been evidence enough to satisfy the Court before which the trial is had that, to use the words of Baily, J., in *Rex. v. Denis*, 'A *bona fide* and diligent

Notice to produce.

What is sufficient search.

(a) *Bratt v. Lee*, 7 U. C. C. P. 280.

(b) See *Marvin v. Curtis*, 6 U. C. C. P. 212.

(c) *Russell v. Fraser*, 15 U. C. C. P. 380. See also as to search, *Ansley v. Breo*, 14 U. C. C. P. 371; *Gathercole v. Miall*, 15 M. & W. 319; *Doe d. Padwick v. Wittcomb*, 6 Ex. 601; 4 H. L. Ca. 425, S. C.; *Taylor on Evidence*, p. 423, 5th ed.; *Smith v. Nevilles*, 18 U. C. Q. B. 473; *Best on Evidence*, 4 ed. 606; *Martin v. Hales*, 6 U. C. C. P. 203; *Marvin v. Curtis*, id. 212; *Bratt v. Lee*, supra, 7 U. C. C. P. 280.

(d) 7 Q. B. 642.

What is sufficient search.

search was made for the instrument where it was likely to be found. But this is a question much fitter for the Court which tries than for us. They have to determine whether the evidence is satisfactory, whether the search has been *bona fide*, whether there has been due diligence, and so on. It is a mere waste of time on our part to listen to special pleading on the subject. To what employment shall we be devoted, if such matters are brought before us as matters of law? The Court below must exercise their own judgment as to the reasonableness of the search, taking into consideration the nature of the instrument, the time elapsed and numerous other circumstances, which must vary with every case."

"As to the diligence in the search necessary to let in secondary evidence, the following quotation from Taylor on Evidence seems to lay down the proper principles to be acted on by the Courts: 'What degree of diligence is necessary in the search cannot easily be defined, as each case must depend on its own peculiar circumstances; but the party is generally expected to shew that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. As the object of the proof is merely to establish a reasonable presumption of the loss of the instrument, and as this is a preliminary enquiry addressed to the discretion of the judge, the party offering secondary evidence need not on ordinary occasions have made a search for the original document as for stolen goods, nor be in a position to negative every possibility of its having been kept back.'"

In a recent case (a) the following remarks were made:—

"I think the only question is, if sufficient search has been made for the original. Now to determine this it must be shewn that search has been made where the instrument would most probably be. It is for the presiding Judge to decide whether reasonable evidence has been given to

(a) *Reg. v. Hinckley*, 8 Law Times, N. S. 270.

satisfy his mind that the document has been lost. But it is also a mixed question of law and fact which the Court can subsequently review."

2nd. When sufficient evidence has been given of destruction of the original document, or of search and loss to let in secondary evidence (*a*), memorials afford, in cases of conveyance, a frequent means of furnishing such evidence, and are admissible or not, and if admitted, have a probative effect according to the circumstances.

When the plaintiff sought to make the defendant liable as assignee of a term on the covenants contained in a lease, and gave notice to produce the assignment, and then evidence by a memorial signed by the assignor, and further evidence that the defendant had taken proceedings in Chancery as assignee, the Court held that the memorial alone was not sufficient, but that coupled with the other facts of the case there was sufficient evidence to go to a jury (*b*).

Sir J. B. Robinson, C. J., in an ejectment suit (*c*) wherein the plaintiff sought to give in evidence a memorial signed by a *grantor*, under whom he claimed, but with whom the defendant who shewed no title *was not in privity*, after stating that there was not sufficient evidence of search to dispense with production of the original deeds, thus expresses himself:

"I have sometimes thought that such evidence as was offered in this case might without danger be admitted to prove the fact of the conveyance being made which is recited in the memorial, especially as against a defendant who has no title in himself; but the Legislature has not thought proper to make such evidence admissible without accounting for non-production of the deed, as is done with respect to bargains and sales enrolled under Stat. 10 Anne, ch. 18, s. 3."

(*a*) As to memorials as *primary* evidence, see 1 Tayl. Ev. 405, 4th ed.; White v. Pike, Co. & Al. 70, per Bushe, C.J.; Cathrow v. Eade, 4 DeGex & Sm. 527, per Knight Bruce, V.C.; Marvin v. Hales, 6 C. P. U. C. 211, per Draper, C. J.

(*b*) Jones v. Todd, 22 U. C. Q. B. 53.

(*c*) Smith v. Nevilles, 18 U. C. Q. B. 473.

Memorial signed by grantor who had but possession in law held good secondary evidence against strangers.

Where the non-production of the original instrument was satisfactorily accounted for, a memorial signed by a *grantor* who was not shewn to have had more than mere constructive possession by force of the conveyance to him, has been held to be evidence not merely against the grantor and all claiming under or in privity with him, but also against third persons not appearing to have any title whatever except a bare possession of insufficient duration to confer a title, as being a statement and act by the party in possession against his own interest as reputed owner of the land (*a*). This case is important as shewing that the memorial is evidence even though the grantor executing it never had more than constructive possession (for the lands were wild lands, and no evidence was given as to possession); and that under such circumstances it is evidence even against one not proven to claim in privity with the grantor. In a case in equity (*b*) between vendor and purchaser on objections that an original deed which apparently could only operate by way of bargain and sale was not forthcoming, and that the memorial signed by the grantor did not shew any valuable consideration to raise the use, the Court (adjudicating both on the law and the facts) admitted the memorial, and from the fact of possession having gone with the alleged deed for sixty years inferred the fact of sufficiency of consideration. There seems moreover to have been no objection on the grounds hereafter alluded to, viz., that the conveyance might have been for life only, or with a shifting use, or in trust. It is to be observed that here, as in *Russell v. Fraser*, the alleged grantor was not shewn to have had more than constructive possession.

Memorial by grantor not in actual possession, and long possession under the alleged deed, the court inferred value given.

The weight of authority is in favor of taking a memorial executed by a grantor in possession, actual or constructive, and against his interest, as good secondary evidence, even against strangers, without corroborative evidence.

(*a*) *Russell v. Fraser*, 15 U. C. C. P. 375, and cases there referred to; *Carthrow v. Eade*, 4 DeG. & Sm. 531; *Moriarty v. Grey*, 12 Irish C. L. Rep. 129; *Moulton v. Edmonds*, 29 L. J. Ch. 181; but see as regards third persons *Doe d. Loscombe v. Clifford*, 2 C. & K. 452; *Hayball v. Shepherd*, 25 U. C. C. B. 536. As to constructive and actual possession, see p. 120, n. a.

(*b*) *Thompson v. Millikin*, 9 Grant, 359.

If the memorial, without referring to an antecedent instrument, simply shewed a bargain and sale of the lands made on a certain day, between certain parties, for money paid, the party tendering it might perhaps as a *last* resource contend that the memorial itself was a good conveyance by way of bargain and sale, as being *per se* sufficient to satisfy the Common Law and Statute of Frauds. Formerly a mere bargain or sale for money raised a use, and the bargainor held for the use of the bargainee; the Statute of Uses executed this use, and gave the legal estate bargained for to the bargainee. The Statute of Frauds required writing and the signature of the party creating the estate; though perhaps a seal only might suffice (a). The Statute of Enrolments, it is true, required that a bargain and sale of a freehold should be by deed indented and enrolled; but neither enrolment, nor registry to supply enrolment, are required here (b), and a deed poll suffices (c).

3. Many of the principles whereon a memorial signed by a grantor is admissible as evidence of a conveyance by him, do not apply where it is executed by a grantee. In the latter case it is a statement, not against, but in support of interest, and by a person not then in possession. Still such a memorial, if coupled with other facts confirmatory of the instrument set out in it, is admissible as parcel of the evidence towards proof.

Memorial signed by grantee, has been held evidence towards proof under certain circumstances even against strangers, but not simply *per se*.

A memorial executed by a *grantee* through whom a person claims, coupled with possession taken under the instrument to which it relates, and enjoyed for a length of time in a mode such as to *preclude the probability of the instrument being other than as set forth by the memorial* is good evidence, even against strangers, especially if accompanied by other corroborative facts; but the mere memorial without more would be evidence only against those claiming under or in privity with the grantee.

(a) Ante, p. 60.

(b) Ante, p. 91.

(c) Ante, p. 91.

Memorial signed by grantee unaccompanied by possession taken under alleged deed, and not otherwise corroborated, insufficient.

On this head a recent case (a) affords most useful information. The plaintiff in ejectment claimed under a deed from one Arnold to one Gough, which he did not produce, and of which he offered as secondary evidence a memorial produced from the Registry Office, executed by Gough, the alleged grantee, with an affidavit of execution of the original deed by Arnold endorsed. The following is the judgment of the Court, delivered by Hagarty, J. :

"No possession appeared to have been taken under the alleged conveyance, and the title is now for the first time after a lapse of 53 years, sought to be established to a valuable property on this evidence.

The plaintiff's proposition may be thus stated, that on a witness proving that he saw a deed apparently answering the description contained in the memorial, and its loss without further proof of hand-writing or genuineness, a memorial in the county registry executed by the grantee only, and proved by an affidavit endorsed of a witness who swore that he saw the conveyance duly signed by the grantor is, in the absence of any act done or possession taken, good secondary evidence of the original conveyance, and that a court and jury should be reasonably satisfied of the fact of such a deed having been duly executed, and that the estate duly passed thereunder. The proposition is startling, and can hardly be adopted except on the surest basis of reason and authority.

The first case I would refer to is (b) appealed from the Irish Chancery to the Lords, 1825.

In 1816 a bill was filed setting up a marriage settlement executed in 1760, of which a memorial was registered in 1763. James Scully was alleged to have thereby covenanted with Lyons, father of the plaintiff, to settle on her (his intended wife) either by deed in his lifetime or by will, one-third of his estate. The memorial was only executed by Lyons the trustee. No deed was executed in grantor's lifetime. He died

(a) Gough v. McBride, 10 U. C. C. P. 166.

(b) Scully v. Scully, 10 Irish Eq. Rep. 557.

in 1816, and by his will left a large annuity to plaintiff 'in full satisfaction of her claims on his property under her marriage articles or otherwise.' She filed a bill asking to have her one-third under the articles. The defendant induced her to sign a memorandum on the will agreeing to confirm and abide by it. She charged that one Mahon, who took largely under the will, and was residuary devisee, had possession of the articles or knew where they were, and evidence was given to prove search, and that Mahon had declared he had either burned or thrown them away. The defendant admitted that they knew she claimed some right to testator's property in his life-time, but that she had solemnly assured him that she would waive all her rights and abide by his will on receiving the annuity of £1,000, and testator on the faith thereof made his will.

Lord Chancellor Manners decreed in her favor, and considered the articles proved. In the Lords the case is argued at great length by Mr. Sudgen and Sir C. Wetherall. Lord Eldon says: 'The question in every case of this sort is whether all the testimony taken together offered as secondary evidence, is or is not sufficient to enable you to say that as you have not the writing itself you will act upon it as if you had it before you, and with an absolute certainty of what these articles contained. It is strongly the inclination of my opinion that this memorial does contain what were the articles of agreement between the parties.' Again he says: 'There is not a single witness who speaks to conversations between plaintiff and testator, who does not characterize him as proposing to her a choice of what was in the will or a one-third of the property as stated in the articles.'

The defendant's counsel admitted in argument, 'that the husband executed an article I cannot deny, for I cannot deny what the will says.' The decree was affirmed.

In 1837, the case of *Peyton v. McDermott* (a) was decided by Lord Chancellor Plunkett. It was attempted to set up marriage articles executed in 1765. The Chancellor

(a) 1 Drury and Walsh, 198.

says: 'I find possession going along with these articles. Again, I have strong evidence under the will of H. O'Rourke (the settlor), of the existence of these articles, as by a reference to them, the otherwise apparent obscurity and confusion in that will and its limitations are explained and rendered plain.' This was a very peculiar case in its facts.

The case of *Biggs v. Sadlier*, decided in Ireland in 1847 (a), enters very fully into the law on this head. It came before the House of Lords in 1853 (b). A memorial signed only by grantee was recorded in 1746. For one hundred years possession had gone in accordance with the facts it recited. The question was whether the original lease, of which it professed to be a memorial, contained a clause for perpetual renewal on the dropping of lives. Many renewals had been made under it from time to time. Proceedings had been taken to enforce a renewal in 1799, and a renewal obtained.

Lord St. Leonards says: 'It has been made a great question in reference to the memorial, which is signed only by the party who takes the interest, whether that of itself by its own force shall be considered as binding the estate of the grantor? That is a totally different question from that which is now before your lordships, because here the question is, whether or not the memorial can be considered as secondary evidence of the contents of the instrument of 1746, and considering the length and nature of the deeds by which it has been recognized, and considering the statute itself under which that memorial was enrolled, and the proof which accompanies that memorial, and bearing in mind too that of course every memorial is signed by the person who takes the interest, because it is he, and not the grantor, who wants the protection of the register, I certainly am of opinion, and I think the authorities will not impeach that opinion, that this memorial is good secondary evidence of the contents of the deed of 1746, it being proved upon search, that the deed has actually been lost.'

(a) 10 Irish Eq. Reports, 522.

(b) 4 H. L. 435.

After noticing the formal proof required by the Registry Act, he continues; 'Then the question is, the deed being lost and the possession having gone for a century, according to that deed, whether or not that memorial is secondary evidence of its contents. I confess I should be ashamed of the law of England if such evidence as that could not be received from necessity as secondary evidence.'

In *Doe d. Loscombe v. Clifford* (a), Alderson, B., rejected the memorial as any secondary evidence. He says 'The memorial is only evidence against the persons who register. I think that if there is no clause in the act of parliament, making the memorial evidence, it is only evidence against the persons registering, and those who claim under them.' See also *Wollaston v. Hakewill* (b).

In Buller N. P. b 254, it is said, 'When possession has gone along with a deed for many years, (the original being lost or destroyed,) an old copy or abstract may be given in evidence without being proved to be true, because in such a case it may be impossible to give better evidence.'

Lord Redesdale says, in *Bullen v. Michel* (c), 'When a record is lost from accidental injuries, an inference is always drawn from the secondary evidence of other circumstances, from which a jury is called upon to presume that of which no direct evidence can be shewn.'

In Taylor on Evidence, Sec. 389, it is said: 'On one or two occasions the memorial or even an examined copy of the registry has been received as secondary evidence of the contents of an indenture, not only as against parties to the deed who have had no part in registering it, but also as against third persons; but in all these cases the evidence has been admitted under special circumstances, as for instance where parties have been acting for a long period in obedience to the provisions of the supposed instrument, or where the deed has been recited or referred to in other documents admissible in the cause.'

I am not aware that our Canadian courts have pronounced any opinion supporting the plaintiff's proposition,

(a) 2 C. & K. 452.

(b) 3 M. & G. 297.

(c) 4 Dow 325.

or at all at variance from the rule to be deduced from the authorities above referred to.

The solitary fact that fifty years ago a memorial appears duly registered by Gough, the grantee, apparently proved by a witness as referring to a deed, which he swears he saw executed by the grantor, shews to us that Gough then apparently asserted title to these premises. The land is not in any remote situation, but in York township, close to the capital of Upper Canada. Had the evidence shewn that possession was taken within any reasonable time after, and that Gough and his descendants acted as the owners of land in apparent accordance with the title asserted in the Registry Office, and to the knowledge of the grantor, who allowed long years to elapse without objection, the strong presumption might be raised that the title was as the memorial asserts. The conclusion drawn by Pigot, C. B., in *Scully v. Scully*, would be applicable: 'I think the inference is so cogent as to be almost irresistible that the possession of the land was influenced by a contract corresponding in import with that contained in the articles of which the document purports to be a memorial.'

But when we find the Gough family abstaining for half a century from doing any act to gain possession of valuable land, and late in 1859, for the first time, bringing ejectment on a title said to be acquired in 1807, the inference to my mind at least 'is so cogent as to be almost irresistible,' that the claim is utterly lacking in all those evidences of good faith, and substantial right required by courts of justice in the formal proof of title to landed property.

A long undisturbed possession by the Goughs to the knowledge of the alleged grantors, who thus acquiesced in the long enjoyment of this estate by another, naturally suggests the presumption that such possession is of right. If we found the additional fact that the possessor affected to be the absolute owner, as by conveying to another in fee, &c., &c., it would heighten the presumption.

Our minds are first led to the belief that there was a right for all this, and then we are led on to infer from all

the circumstances that the right was as is set forth in the memorial publicly placed on record with all statutable requirements, as a formal assertion of title by the grantee. We thus are led to believe that the long undisturbed possession and acts of ownership were based on this foundation of right.

Such a conclusion strikes my mind as analogous to that class of cases in which inferences are drawn from the silence of persons who listen without objection or dissent to the assertions of title by another derived from them, and who afterwards permit such other to obtain possession, and use the property so claimed for years without objection.

In this way the facts all combine to make up evidence directly affecting the alleged grantor, and making the presumption convincing that the claim is as the grantee asserts.

My opinion is that the plaintiff wholly failed to make out any case for a jury—that his evidence only proves that his ancestor fifty years ago asserted a claim to this land by his own written declaration and the oath of a witness in the registry office, that he never pursued his alleged right—and that it would be contrary to all authority, and tending to established a most dangerous precedent if such evidence be held sufficient to give title to an estate.

I think the non-suit was right. In the view I have taken, it is unnecessary to notice at length the further strange feature in the case, that the Barrett family seemed to have claimed the land for many years, and that Montgomery states he received a deed from young Barrett, purporting to be from T. B. Gough to his mother, which deed was not produced or accounted for."

The evidence (a) to support a conveyance from a sheriff under execution to one McCrea, was as follows :—Searches for the deed, which the Court held sufficient ; proof of the *fi. fa.* against lands ; the receipts thereon endorsed by sheriff

(a) *Fields v. Livingstone*, 17 U. C. C. P. 15.

Memorial signed by grantee held sufficient, notwithstanding errors in it, when corroborated.

6th December, 1823; memorandum attached thereto in the sheriff's handwriting signed by him, "Lot 17, Con. 1, Harwich, sold at sheriff's sale 11th December, 1824, to William McCrea, for £125, sheriff's fees paid by William McCrea;" the *Gazette*, and publication therein dated 9th December, 1823, reciting a seizure of the land by the sheriff and notice of sale for 11th December then next; a memorial signed by the grantee, produced by the registrar, registered 17th December, 1820, purporting to be of a conveyance by the sheriff dated 16th December, 1830, in consideration of £125 paid him by McCrea, whereby he granted the land to McCrea, and all the interests of the execution debtor therein; it was therein stated that the deed was witnessed by two witnesses, gentlemen, residents of the town of Sandwich. This memorial was signed by the *grantee*, in presence of but one witness. It was also proved that the execution debtor died in 1824, and under an ejectment suit his widow was turned out of possession in 1825 by the deputy sheriff, and possession given to McCrea. The material objections on the question of evidence were, that there was no sufficient secondary evidence, that the memorial signed by one witness only was void as such under the Registry Act, that it bore date 20th December, 1830, was registered 17th December, 1830, and the affidavit of execution appeared to have been made 22nd December, 1830.

The following is part of the language of the Court on giving judgment:

"Are the facts, then, in the present case consistent, and more consistent with the fact of the sheriff having made a deed to McCrea, the purchaser, than with the fact that he did not make one? The sheriff was commanded by process to sell the land. He advertised it for sale, and received £125 from McCrea, and, as appears by the sheriff's memorandum, which is good evidence, because it is an entry in the usual course of business, and against interest, he received this money as the price of this particular lot which McCrea had purchased. It was the sheriff's duty also to have made a deed. Admittedly, however, he did not make it for

several years after the sale. A memorial, or a document professing to be a memorial, was executed in December, 1830, by the grantee, of what is alleged to have been this particular deed, and it was registered at that time. Possession was not taken under this supposed deed until about eighteen years after the making of it, and about twenty-three years after the actual sale; but possession has been held for the last eighteen years under this alleged deed, and the defendant now maintains his possession by virtue of it."

The Court held that there was sufficient evidence of the conveyance, but they relied on the other facts beyond the memorial, and it is probable that if they had been wanting the evidence would not have sufficed (a). It is to be remarked that the subscribing witnesses were not called, nor any reason given why they were not.

There would seem to be some danger in allowing mere length of possession and dealing with the property to be sufficient corroborative evidence whereon to adopt as evidence of a conveyance in fee simple absolute a memorial executed by a grantee. Take the case of a conveyance to such grantee for life only; or of a grant to uses to the use of some person in fee, but with a shifting use over; or of a devise in fee with an executory devise over on the happening of an event, and a memorial thereof executed by the grantee, referring to an instrument in fee simple absolute. Here, the life tenant, or first taker, might have destroyed the instrument (to the custody of which he is entitled) (b), and have conveyed in fee simple absolute, and the property have passed in fee *bond fide* through various hands during the life of tenant for life, or before the event whereon the shifting use or executory devise over is to take effect, for fifty years or more, and the possession and dealing with the property have thus been consistent with right of possession, and with the conveyance in fee as set out in the

Danger of allowing mere length of possession, and dealing with the property and memorial signed by grantee to be deemed sufficient evidence of a conveyance in fee absolute.

(a) See *Wishart v. Cook*, 15 Grant, 237, a case between vendor and vendee.

(b) See ante, p. 472.

memorial. The reversioner, or other person entitled, or his heirs, are not supposed to enquire till their right accrues, and when it does, they have to contend against evidence offered of the fraudulent memorial, and the possession and dealing said to be consistently with it. Again, those entitled on the death of the life tenant, or on the event happening whereon their right accrued, might have been under disability. It might be urged that it may always be assumed that a false memorial as above suggested could not be registered, on the ground that the registrar, as a public officer, would be presumed not to register the instrument if incorrect. It is known, however, that practically, this assumption affords no safeguard, that as a general rule the registrars are quite incapable of placing a construction on an obscure will, or on any but the most common instruments, and are unwilling to incur the risk of declining to register on the ground of a supposed variance. Moreover, until recent Registry Acts, it was not necessary to set out in the memorial the quantity of estate, *i. e.*, the interest, conveyed, and therefore it was held that a memorial varying from the original in that respect, and so registered, was not defectively registered (*a*). The registrars therefore may not have felt themselves bound to see whether a memorial set out truly in accordance with the instrument matters which the acts did not require to be set out; or to reject the memorial if they found in such matters any variance. The evidence therefore afforded by the mere fact of registry is, it may perhaps be urged, not so strong in regard to those all-important particulars which need not have been set forth as to those which must.

Mere length of possession seems not sufficiently corroborative of a memorial signed by grantee that the conveyance was in fee,

The cases when examined hardly go the length of shewing that mere length of possession though for considerable time, under an alleged grant in fee, coupled with a memorial executed by the grantee, is sufficient evidence against those not claiming under or in privity with the grantee. There are either other facts which lead to the belief of, or are

(*a*) Lessee McDonell v. Murphy, 2 Fox & Smith, 304 *in notis*; Mill v. Hill, 3 H. L. Ca. 828; Wyatt v. Barwell, 19 Ves. 435.

confirmatory of, the instrument; or, if mere length of possession alone has been considered sufficient, it has been in cases other than on a question of whether the conveyance was in *fee simple absolute* to the grantee, and where the possession had was quite inconsistent with the instrument being otherwise than as set out in the memorial. It has been above pointed out that there may have been possession for fifty years or more under a conveyance or will alleged by the grantee or devisee to have been in fee, which possession was quite consistent with a lesser or conditional estate only having in fact passed.

If mere length of possession in those claiming under the memorial executed by a grantee is to be the only circumstance corroborative of the memorial, as evidence of a conveyance in fee as therein stated, the question at once arises what length of possession is required. Considering the cases above alluded to of a life estate only being in fact granted, and of limitations by way of shifting use, or by executory devise, and of disabilities, it may be said that the only safe guide would be that length of possession which the courts have established as that from which a title must be shewn to a purchaser, namely, sixty years. The rule is based on grounds applicable to the present question. The ordinary duration of human life is assumed to be sixty years: taking, therefore, as the root of title a conveyance sixty years old, from some one shewn to have been then in possession, but whose title is not otherwise shewn, and conveyances thence in a proper chain of title to the vendor, there is good reason to believe he has good title. It is fair to assume the grantor in the first conveyance was of age when he conveyed: taking him to be then only twenty-one, and to have died at the age of sixty, the right of those in remainder or reversion then accrued; twenty years would in ordinary circumstances bar them, and thus the sixty years' possession would confer a title, but only barely so.

if so however,
then 60 years'
possession
only should
suffice.

It will be observed, however, that after all the safety of the purchaser of the title under these circumstances would

rest more on the Statute of Limitations, than on the presumption that the conveyance is in fee simple absolute.

As between vendor and purchaser and under the act to quiet titles stricter evidence required than in ejectment.

4. As between vendor and purchaser, and under the Act for Quieting Titles, stricter evidence is required than in ejectment, which is not final in its consequences, and in which the mere temporary right to possession as between only the claimant and the defendant is in issue. It is evident that though the admission of a grantor by a memorial, or otherwise, that he conveyed in fee, should be evidence whereon a claimant in ejectment may establish mere *prima facie* right to possession, it is quite consistent with such admission that the conveyance is on trust, or subject to be defeated on payment of money, by a shifting use, or the like matters, which in ejectment the claimant is not required to negative, but of which a purchaser must have evidence.

Conveyancer's evidence,

As between vendor and purchaser, and under the Act for Quieting Titles, the following remarks from Hubback on Succession, pt. 1, ch. 3, p. 62, apply:—"In weighing the insufficiency of evidence, the practice of conveyancers is more strict; in determining its admissibility, more lax than that of Courts of Justice. The former seems to be an effect of the difference in the position of the parties; the latter, of the difference in the powers and functions of those by whom the evidence is judged. The purchaser in *bona fide* transactions, by the mere possession of his purchase money, shews and offers to pass an indisputable title to it; whilst the title to land not appearing by possession, he cannot have the same assurance of the vendor's right to the equivalent bargained for. This much seems to be settled; that higher evidence is necessary than such as would merely prevail in ejectment. There are erroneous judgments upon defective or unsound evidence which may be cured by another ejectment; but if the doubts upon a title should after completion ripen into defects, the purchaser may find it impossible to regain the position which he held before the contract. What Lord Eldon observed of legitimacy seems to be true of any other matter of fact expressly

higher evidence required than would sustain an ejectment.

or impliedly alleged on the abstract; that a jury may collect the fact from circumstances, and yet the Court would not compel a purchaser to take the title merely because there was such verdict. The Court will weigh whether the doubt is so reasonable and fair that the property is left on his hands not marketable. The rule applies generally to presumptions of fact, which conveyancers are slower of raising than Courts of Justice. Thus a seven years' absence without tidings, though it prevails as evidence of death in ejectment, is clearly insufficient as between vendor and purchaser. Besides the greater difficulty of retracting an erroneous step, there exists another cause of difference from forensic practice, the more extensive office of conveyancer's evidence, which is to afford reasonable satisfaction to the purchaser, that the title is good against all the world, and not merely like that of evidence in litigation, that it is sufficient to prevail against certain contending parties. In this particular, a vendor's evidence resembles that of a claimant of peerage; it is not to shew a better or preferable title relatively to any other, but to prove that the title is certainly and exclusively in the party asserting it. Again, conveyancers' evidence is for the most part necessarily *ex parte*; a vendor may therefore be required to furnish evidence which would be elicited by adverse proceedings, to prove or disprove facts, which, if he were a party litigant, it would be the business of his opponent to negative or establish. The heir in ejectment, either by or against him, or as a party to a suit in equity, need not adduce proof that his ancestor died intestate, it resting with his adversary to prove the affirmative fact of a will, if there is one."

The execution of a memorial which is receivable in evidence need not be proved when more than thirty years old (a); and it would seem that where a foundation is laid by search or otherwise for the admission of the contents of a memorial as evidence, and when requisite, sufficient corro-

Execution of
memorial,
how proved.

(a) Doe Maclem v. Turnbull, 5 Q. B. U. C. 129.

borating circumstances or privity shewn, that such memorial, though not thirty years old, produced from the registry office, need not be proved; and that a copy certified by the registrar as such, is also admissible without proof of execution of the original, or of the instrument to which the original relates (a).

Result of the
authorities.

It is difficult to gather any very definite principle from the cases. So far as the ordinary principles of evidence apply, it appears difficult to escape from the conclusion of Alderson B., in *Loscombe v. Clifford*, that "if there is no clause in the Act of Parliament making the memorial evidence, it is only evidence against the persons registering and those who claim under them;" and indeed this seems to be assumed as the rule in *Taylor on Evidence*, sec. 389, (before quoted,) where the author observes "That in all cases where the evidence has been admitted against third persons, it has been under some special circumstances"; (drawing no distinction between such memorials as have been executed by the grantor and those which have been executed by the grantee). Perhaps, however, this may not be the rule when the memorial is executed by the grantor, and is in reality against his interest, and not as in the case of *Jones v. Todd*, where the grantor was in fact getting rid of a *damnosa hereditas*, and when the memorial was sought to be used against the grantee: though in strictness to render the evidence admissible on this ground, it would of course be essential that the grantor should be proved to be dead at the time the evidence is tendered. When the memorial is executed by the grantee it seem admitted on all hands, (and the same rule must apply, where though executed by the grantor, it is not in reality against his interest) that it is not necessarily, or in all cases, secondary evidence. And here the distinction must be borne in mind between the admissibility and the weight of the evidence. It seems in the cases in which such evidence has been admitted, that

Distinction
between the
admissibility
and the
weight of the
evidence.

(a) *Marvin v. Hales*, 6 U. C. C. P. 211; *Lynch v. O'Hara*, 6 U. C. C. P. 267; *Buller N. P. 255*; see also *Doe d. Prince v. Girty*, 9 U. C. Q. B. 41; *Con. Stat. Can. ch. 80*; 31 *Vic. ch. 20*, ss. 21, 31.

the memorials have been rather treated as part of a chain of circumstances given in evidence towards proof of the alleged deed, than as secondary evidence in themselves; and the decisions in effect appear to be, that from the existence of such a memorial coupled with the other proof, the existence of such a deed may be presumed; in other words, that there may be circumstantial secondary evidence, and that such a memorial may form a link.

The remarks of Lord Eldon in *Scully v. Scully*, are in accordance with this view—"The question, he observes, in every case of this sort is, whether all the testimony taken together, offered as secondary evidence, is or is not sufficient to enable you to say, that as you have not the writing before you, you will act upon it as if you had it before you, and with an absolute certainty of what that writing contained." And the observations of Lord St. Leonards in *Saddler v. Briggs*, point in the same direction. It may be observed that most of the English cases in which the memorials have been admitted, have been cases in Equity, in which the Court were judges, both of law and fact, of the admissibility and weight of the evidence (a). Viewed in this light, the effect of a memorial, and the attendant circumstances, become a question rather of fact than of law, and its probative effect in each case will depend, to use the words of Lord Eldon, upon whether upon all facts taken together the Court, or the jury under the direction of the Court, can say they will act upon the alleged writing as if they had it before them. And this would seem not only to be the only way of reconciling the cases, but the only logical way in which such a memorial can be held to have any probative effect whatever. It is certainly not very logical to say, that the question, whether a memorial is in itself secondary evidence, should depend upon whether from other circumstances, it appears probable that the result of such evidence is true; while by treating it as merely a link in the chain of circumstances, this apparent difficulty is obviated.

(a) See *Thompson v. Milliken*, 9 Grant, 359 *supra*.

Bearing in mind the distinction above referred to as regards the evidence requisite in ejectment, and between vendor and purchaser, or under the Act for Quieting Titles, and that in the two latter cases negative evidence beyond the memorial is requisite to displace possible existence of matters which is not set forth in it, and of which therefore it affords no evidence, the result on the whole appears to be —

1st. That a memorial executed by either grantor or grantee is undoubtedly, secondary, if not primary evidence, against all persons claiming under the person executing.

2nd. That when executed by the grantor, in possession, actual or constructive, and really against his interest, it is probably evidence against third persons.

3rd. That if executed by the grantor, when not in possession, or by the grantee, and not against the interest of the party executing, it is not in itself secondary evidence, but may with other circumstances form a link in the chain of circumstantial evidence, proving as secondary evidence, the existence of a deed.

APPENDIX.

FINLAYSON V. MILLS.

[11 Grant, p. 218.]

Merger.

The bill in this cause was filed by Hugh Finlayson, J. McQuaig, and Isaac Buchanan, against Samuel Mills, J. Buchan, William Freeland and Alexander Spottiswoode, setting forth that in June, 1856, Spottiswoode agreed to sell certain lands in the township of Blenheim, to Currie, Buchan, and Freeland, and for £2,500, part of the purchase money, a mortgage was to be given, but which had not, owing to a dispute as to the terms been executed, although the deed to them had been executed and delivered by Spottiswoode, when on the 2nd July 1857, he assigned all his estate to the plaintiffs, for the benefit of his creditors; that Mills claimed to be a creditor of Spottiswoode, to the amount of £1,130, as being a balance due him on the dissolution of a partnership which had at one time existed between him and Spottiswoode. and which had been dissolved in August, 1856, and to secure which Spottiswoode executed an instrument in May, 1857, creating a mortgage on part of the premises, to secure payment of the sum so due him: that subsequently and in the year 1859, Mills, without the consent of Spottiswoode or plaintiffs, purchased from Buchan, Freeland and Currie, their interest in the property conveyed to them, and agreed to assume their position, as to the contract with Spottiswoode, and indemnify them against the unpaid purchase money. The plaintiffs submitted that under the circumstances they, as assignees of Spottiswoode, had a first lien on the property for the unpaid purchase money, to the extent of the difference between the £2,500, due by Buchan, Freeland, and Currie, in respect of their purchase, and the £1,130 due to Mills, and the bill prayed relief accordingly.

The defendant Mills answered the bill, setting up that it had been with the consent of the trustees that he had effected the purchase, the intention being that he should hold the land freed of the vendor's lien, in discharge of the sum so due him by Spottiswoode, the lands having become so depreciated in value as not to be worth that amount.

SPRAGGE, V. C.—The facts, so far as they are material to the case, are shortly these.

The defendant Spottiswoode, in June, 1856, conveyed with other lands the north halves of lots 19 and 20, in the 6th concession Blenheim, to Currie, Buchan, and Freeland, a portion of the purchase money was paid, and a large sum, a little under or over £2,000, remained unpaid. The

plaintiffs allege that a mortgage was to have been given to secure this balance, but this is not proved, and no mortgage was given. Spottiswoode was a vendor, having a lien for unpaid purchase money.

In February, 1857, Currie assigned to his co-purchasers his interest in the purchased property. In May of the same year, Spottiswoode, being indebted to the defendant Mills in the sum of £1,130, assigned to him all his right, title, interest and property, in the north halves of lots 19 and 20 to secure that sum. The sale to Currie, Buchan, and Freeland, and the fact of a portion of the purchase money remaining unpaid, are recited in the assignment. In July of the same year, Spottiswoode assigned all his real and personal estate to the plaintiffs, for the benefit of his creditors.

The position of the parties, so far, appears to be this: Spottiswoode assigns his vendor's lien first to Mills, to secure his debt to him for a less amount than the unpaid purchase money, and then assigns generally to the plaintiffs, which carried to the plaintiffs the right to receive the balance of the unpaid purchase money. The next material fact is, that Mills purchased from Buchan and Freeland the land itself, whether the halves of 19 and 20, or the whole of the land sold by Spottiswoode, does not seem to me to be material. He had previously commenced a suit in this court against Buchan, and Freeland and Spottiswoode, and the plaintiffs in this suit; and that suit was compromised by the conveyance of the land by Buchan and Freeland to Mills—no money passed upon this sale. Mills in his answer says, that the lands had so fallen in value that they were not worth the amount of his debt against Spottiswoode: that Buchan, Freeland, and Spottiswoode were all insolvent, and that the plaintiffs, as he is informed by his solicitor, had notice of the proposed compromise, and acquiesced therein. The consideration is not more definitely stated. Mills, and Buchan, and Freeland differ as to whether Mills was to indemnify them against the claim of the assignees of Spottiswoode for the balance of purchase money, beyond the amount due to Mills himself; but however that may be, Mills became and is the owner of the land upon which the vendor's lien existed; and this bill is filed to enforce that lien. Mills claims to be a mortgagee, within the statute 14 and 15 Vic. ch. 45. He claims that he is first mortgagee, and that plaintiffs are assignees of a second mortgagee, or of one who stands in that position, and that his acquiring what, for this purpose, we must call the equity of redemption, does not postpone him.

I am of opinion that Mills does not come within the protection of the statute. To make it apply, there must be two mortgages, each forming a charge upon the same property. If Spottiswoode were a mortgagee, there would be two mortgages in one sense, a mortgage to him and a mortgage by him to Mills, but they would not be two mortgages within the act. Mills would not be a prior mortgagee, but a derivative mortgagee; and there would be only one mortgage, in the sense in which the

act treats of mortgages; and an assignment of that one mortgage. All that can be said is, that the assignment gave the assignee a right to receive a portion of the mortgage money, in priority to the right of the mortgagee to receive any portion of it. Whether the provisions of the act might properly have been made to apply to such a case it is not for me to say, but I cannot so read the act as to apply them to it.

But in fact, there is in this case no mortgage at all within the meaning of the act, but an assignment of an equity, and Mills was not a mortgagee of freehold or leasehold property within the act. The title in the Consolidated Statutes, "An act respecting mortgages of real estate," and the whole tenor of the act, shew this. I incline to think that the proper conclusion as to the purchase is, that the consideration was the unpaid purchase money, and if so, the case is clear. The whole was due to Spottiswoode; he pledged a portion of it to Mills; Mills has the land and cannot claim to retain out of the purchase money more than the portion of it due to himself; as to the difference, unless he accounts for it to the vendor, he has both the land, and so much of the purchase money.

Apart from the act, the plaintiff's case, as against Mills, is that they, the plaintiff's, have a vendor's lien upon certain real estate of which Mills became the owner with notice of the vendor's lien; and whatever may have been the consideration, as between Mills and the original purchasers, the plaintiffs cannot be affected thereby unless assenting parties to some arrangement whereby their lien should be extinguished. There is no evidence of this; all that there is in the way of evidence is that one of the plaintiffs, as trustee of Spottiswoode, approved of the proposed compromise of the suit, a suit to which he with his co-assignees were parties.

VAN KOUGHNET, C.—The words in the deed of the first of March 1859, reciting that the conveyance to Mills was in satisfaction of his debt, and the last written words, dispose of the question of intention, even if that were to govern to the full extent contended for by Mr. Blake. These words leave no doubt as to the contract of the parties, from which the intention must be gathered.

I agree with my brother Spragge in his judgment, that the statute relating to the purchase of equities of redemption does not apply to this case.

[For the application and comprehension of much of the law in portions of the following judgment of Mowat, V. C., the facts of the case will perhaps be less complex by regarding them according to what Spragge, V. C., in his judgment states to be the contention of the defendant Mills. For this purpose Mills may be regarded as first mortgagee, the plaintiffs as second mortgagees, and Mills may be considered as having purchased the equity of redemption of Currie, Buchan, and Freeland, the mortgagors, since a vendor's lien operates as an equitable quasi-mortgage.—
Ed.]

MOWAT, V. C —Some question was raised as to whether, according to the bill, the legal estate in the property in question passed to Currie, Buchan, and Freeland. But however this may be, there is no doubt that these persons, from the time of their purchase from Spottiswoode until they transferred their interest to Mills, were at all events, equitable owners of the property; that Spottiswoode had a lien or charge upon it for the unpaid purchase money; that the effect of his mortgage to Mills was to give Mills a first charge for his debt, and to make Spottiswoode's claim for the balance a second charge; that Mills, having thus the first charge, took from Currie & Co., the owners of the estate, in equity if not at law, a release of their equity of redemption; and that, by means either of the mortgage from Spottiswoode or of the deed from Currie & Co, Mills obtained the legal estate.

Prima facie, according to English law, the effect of these dealings of Mills undoubtedly was to merge his charge in the estate, and to leave the balance due Spottiswoode the only incumbrance on the property, as the decree pronounced it to be. Lord St. Leonards, in *Garnett v. Armstrong* (a) states the English rule thus: "The cases establish that if you, with a prior incumbrance, buy the estate which is subject to a subsequent incumbrance, you let in the second incumbrance to the injury of your first incumbrance; that in fact you lose your incumbrance."

Counsel for Mills did not dispute this general rule, but they contended that the doctrine of merger, as so laid down, depends on intention; that Mills had no intention to merge his debt when he agreed for or accepted the release of Currie & Co.'s equity; and that, at all events, the Act respecting mortgages (22 Vic. ch. 87), protects and keeps alive the charge of Mills, notwithstanding his purchase.

We were referred to *Mayhew on Merger*, 119 *et seq.*; *Tudor's Leading Cases*, 845 *et seq.*; and *Fisher on Mortgages*, 312 *et seq.*, for the cases which establish that it is the intention of the party taking the equity of redemption that governs; and this certainly is so, where the party becomes owner of the estate by inheritance or devise. In that case it is for such party alone to determine whether he will keep alive the charge, or will allow it to merge; no one can claim a right to interfere with his wish. The question generally arises between his real and personal representatives after his death; for if there is no merger, his personal representatives are entitled to the debt; and if it merges, the heir takes the estate free from the debt. In such a controversy, if it appears that the party expressed an intention as to the merging, or keeping alive of the charge, effect is given to such intention. If there is no express evidence of intention either way, an intention gathered from his acts will do. In case his intention does not appear, either by express evidence or by his acts, the merger will not take place if there is any other large incumbrance on the

property: for as in that case it may with some probability be assumed to have been for his interest that the charge should remain on foot, as a protection against the other incumbrance, his intention is assumed to have been in accordance with his probable interest. If the other incumbrance is extremely small, as compared with the value of the property, so that he cannot reasonably be supposed to have had any interest in keeping alive his own charge as a protection against it, the intention to keep it alive is not presumed, and the merger takes place (a). So where there is no evidence of an expressed intention either way, and no other incumbrance on the property, and it is therefore a matter of indifference to the owner whether the charge subsists or not, a merger takes place.

But where the owner of a charge becomes the owner of the estate, not by devise or inheritance, but by bargain and purchase, the case is somewhat different. Here it may not be the wish, or expressed intention, or interest, of such owner alone, that is material; the interest of the debtor, whose estate he has acquired, is material also. But no doubt, if the contract between them contains an express stipulation, or manifests a clear intention by both parties, that the charge should be kept alive, notwithstanding the purchase, this may be done. Whatever doubt on this point existed formerly, none exists now (b). In *Cooper v. Cartwright* (c) Sir W. Page Wood laid it down as now clear that, "in the ordinary case of a sale of a mortgaged estate, if the mortgagee and the mortgagor concurred in desiring to have the mortgage kept on foot, they would be entitled to have the contract for purchase performed in the way they wished." Accordingly the learned Vice-Chancellor proceeded to shew that the terms of the contract shewed conclusively that the mortgage in question was to be kept alive, and added: "Therefore the case is precisely the same as if the plaintiff [the vendee] and Cartwright [the original mortgagor] had both come to the vendors [Cartwright's assignees in bankruptcy] and said that they concurred in desiring that the mortgages should be kept alive. The only possible question that can arise is one of form as to the mode in which the assignees are to be discharged from the mortgage debts."

No doubt also as the law now stands, if the contract contains no express stipulation on the subject, the vendee has a right, as against the vendor, while the contract remains *in fieri*, to have it carried out in such a form that a merger may be avoided, provided he takes care that the vendor is effectually discharged from the debt; for to use again the language of Sir W. Page Wood in the case already quoted: "It is a matter of pure indifference to the vendor whether his debt is actually discharged, or whether he is personally discharged from all personal liability with respect to it," and the question is merely one of "con-

(a) *Richards v. Richards*, Johns, 754.

(b) *Bailey v. Richardson*. 9 H. 734; *Watts v. Symes*, 1 DeG. McN. & G. 240.

(c) *Johnson*, 686.

venience to the purchaser, not involving any matter of substance affecting the vendor," who is not permitted "to raise objections to the form of the conveyance."

In the present case, the defendant Mills does not allege in his answer that there was any contract on this point either way; and the only evidence about it is that of his own attorney, who says no more than that it was no part of the agreement that Mills should pay off Spottiswoode. But neither was it, so far as we are informed, a part of the agreement that Mills should not pay him off; or that Spottiswoode should be paid by Currie & Co.; or that they should obtain a release from Spottiswoode or his assignees; or that Spottiswoode or his assignees should give such a release. In the absence of any agreement on the subject, the legal implication is that Mills, as the purchaser of the equity of redemption, should pay Spottiswoode's claim (a). The omission to make any express stipulation may have been from a knowledge of this legal implication, and in reliance on it; or it may have been in ignorance of it, and from want of thought; but as to this there is no evidence, nor do I say that in this case such evidence would be material.

But though there was no express agreement, can the intention, and therefore an agreement, be made out by implication from the form of the instruments by which the bargain was carried out? There were but two documents: the deed of release from Currie & Co. to Mills, and a bond of indemnity from Mills to Currie individually against Spottiswoode's claim. Buchan and Freeland say, that they too, were to have had a bond of indemnity; but this is denied by Mills, and there is no evidence of it. These instruments do not appear to have been hastily prepared or executed. The deed of release alone has been produced. It was drawn by Mill's solicitor, and was sent to Mr. Freeland, the solicitor for Buchan and Freeland. Mr. Freeland added a description of some other lands, and got the deeds executed by his clients and Currie. Mill's solicitor received the deed (executed) on the 12th of April, 1859, subject to the costs Mills had agreed to pay. It was subsequently accepted by Mills, after a conversation with his solicitor about the additional description which Mr. Freeland had introduced; and was registered by Mills on the 5th of November. This deed is expressed to be made, "in consideration of the settlement of a suit" of foreclosure "between the present parties" to the deed, "and others, and in satisfaction of a certain lien or claim of £1,130 and interest, which Mills had on the property;" and the release is declared to be subject, as to all the lands described in it, to the lien and interest of Alexander Spottiswoode therein. In view of all this language, I think that the deed, instead of affording evidence of an intention to maintain the charge, contains the clearest intimation of an intention to destroy it; for what Mills has to make out is in effect, that

(a) *Barry v. Harding*, 1 J. & La. T. 485.

the release was not to be a satisfaction of the debt, and that Mills was to take, not subject to Spottiswoode's interest, but free from it.

The parol evidence contains nothing that forbids the conclusion which is to be drawn from the deed. On the contrary, Mr. Mill's solicitor expressly states in his evidence, that "it was part of the agreement that Buchan and Freeland were not afterwards to be liable to Mills."

The same witness informs us it was part of the agreement, "that in order to induce Currie to join in the conveyance, Mills should execute to him a bond to indemnify him against any claim that the assignees of Spottiswoode might make against him." It is not alleged that Buchan and Freeland were to indemnify Mills against this liability, and the effect of the bond would therefore be that Currie might at any time afterwards compel Mills to pay Spottiswoode or his assignees, in order to free Currie from his liability: *Ranelagh v. Hayes* (a), *Lee v. Rook* (b), *Pember v. Mathers* (c); or Currie might, if he chose, pay the whole debt himself, and sue Mills for it on his bond of indemnity.

Under all these circumstances, I do not see how it is possible for a court to hold that Spottiswoode's debt to Mills still subsists, and that the plaintiffs must pay it or lose their own share of the purchase money.

The argument from the Consolidated Statute respecting mortgages (22 Victoria, ch. 87) remains to be considered. It is urged that this statute entitles Mills to insist on his debt notwithstanding his purchase. But I cannot so read the act. I cannot suppose that the act was intended to put it out of the power of parties to give priority to a subsequent incumbrance. The object of the legislature rather was, I apprehend, to prevent a merger of the debt by the operation of any technical rule where such a result would contravene the intention of the parties, and not to prevent a merger where a merger is necessary to give effect to the intention of the parties. At the time of the passing of the act, the provisions of which now form this chapter of the Consolidated Statutes, some legislative enactment for this purpose was, no doubt, supposed to be necessary. In *Toulmin v. Steere* (d), Sir William Grant had cited two cases, which he said were "direct authorities to shew that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently, a mortgage which he has got in, against subsequent incumbrances of which he had notice." Mr. Fisher, in his book on Mortgages, page 445, understands this case as having laid down "that the purchaser of an equity of redemption cannot keep up a charge for his own benefit." So Mr. Mayhew in his book on Merger (1861), after stating that "a purchaser of an equity of redemption may now, by paying off the first mortgage out of the purchase money, and shewing an intention to do so, stand in the mortgagee's place against the next

(a) 1 Vern. 159.

(b) *Morseley*, 318.

(c) 1 B. C. C. 53.

(d) 3 Mer. 210.

incumbrancer," adds: "The case of *Toulmin v. Steere* was considered an authority against this position" (a). Yet, before the passage of our act, *Toulmin v. Steere* had been almost uniformly recognized as an authority in equity; and in this court two cases had occurred, in the year 1850, which were decided on the doctrine of merger (b); and the court had in both cases found it necessary to give effect to the doctrine under circumstances of great hardship to the defendants.

The Act in question was passed soon afterwards (August, 1851), and provides, by the 1st section, that a purchase of the equity of redemption may be made by a mortgagee without merging his debt; and by the 2nd section, that in such case a subsequent mortgagee cannot foreclose or sell "without redeeming or selling, subject to the rights of the prior mortgagee." Any doubt as to the validity or effect of such a transaction in this country was therefore removed.

The course of judicial decision appears to have done the same thing, or nearly the same thing, in England, since the passing of our statute. It was in December, 1851, that *Watts v. Symes* (c) was decided. In that case Lord Justice Knight Bruce, after quoting Sir William Grant's language, in *Toulmin v. Steere* said: "With the greatest deference to the authority of that eminent Judge, I always doubted, and still doubt, whether the cases mentioned by him go that length." The notice that the purchaser had of the incumbrance, to which Sir William Grant gave priority, was constructive notice only; and the prior mortgagee joined in the purchase deed and conveyed the legal estate to the use of the purchasers. In *Phillips v. Gutteridge* (d. (1859)), there were two mortgages for £300 and £400 respectively, on separate leasehold properties. The mortgagor died, charging both parties with an annuity. His executor agreed with Catherine Phillips that she should pay off the two mortgages, and lend the executors £500 more. She did so, and the mortgagees and executors joined in a new mortgage to her for the £1200. Nothing was done therefore on which an argument could be founded for keeping alive the mortgages beyond what appeared in *Toulmin v. Steere*; yet it was held, first by V. C. Stuart, and afterwards by the Lords Justices, that there was no merger. Lord Justice Knight Bruce said: "The conveyance may not have been perfect, but there can be no doubt as to the intention of all parties to preserve the priority of the charges of £300 and £400 (e)."

The law of the court, both under the statute and independently of the statute therefore now is, that a mortgagee may take a release of the equity of redemption without merging his debt; but I think that in this case *Mills* has not done so; that on the one hand, we have no evidence

(a) See *Dart on Vendors*, to the same effect, p. 590, 3rd ed.

(b) *Emmans v. Crooks*, ante vol. i. p. 169; *Myers v. Harrison*, ante vol. i. p. 449.

(c) 1 DeG. McN. & G. 240.

(d) 4 DeG. & J. 531.

(e) *Vide also* *Bailey v. Richardson*, 9 Hare, 734 (1852); *Cooper v. Cartwright*, Johns, 696.

whatever that he was not content to merge his debt in the estate he was acquiring, and that on the other hand, we cannot give the natural and fair effect to the express bargain between the parties, or to the intention which it manifests, without holding that the debt of Mills is extinguished and that the plaintiff's claim is the only charge on the property (a). I think the decree should be affirmed.

MOORE V. THE BANK OF BRITISH NORTH AMERICA.

15 Grant, p. 308.

Registry law—Constructive notice.

In case of an unregistered interest of a date antecedent to the Registry Act of 1866, and not founded upon a deed or conveyance which was capable of registration, constructive notice is sufficient notice against a subsequent registered conveyance; and possession of the property by the party having such unregistered interest is sufficient constructive notice for this purpose.

The Court of Chancery in this country having frequently held constructive notice of an unregistered interest to be insufficient where such unregistered interest was founded on an instrument capable of registration, and the want of actual notice was not wilful or fraudulent, this rule will continue to be acted on, until the different doctrine lately held by V. C. Stuart in England, and Mr. Justice Lynch in Ireland, is adopted in Appeal either in England or here.

This cause was originally heard before the Chancellor, at Brantford, and came on for re-hearing before the two Vice-Chancellors, on the decree pronounced by his Lordship. The facts out of which the case arose are fully stated in the judgment.

The cases cited are with others, mentioned in the judgment of the Court, which was delivered by

MOWAT, V. C.—This cause was re-heard before my brother Spragge and myself, in the absence of the Chancellor, before my brother Spragge went to England in 1866, and the incessant pressure of new business since his return has prevented our disposing of the case until now (21st April, 1868).

The plaintiff claims certain land, comprising fifty acres, under a parol contract made by the plaintiff for the purchase thereof from the defendant Thomas Moore. The facts are not disputed. The plaintiff came to this country, with his family, in the fall of 1850, and in September of that year agreed for the purchase of the land in question for \$150, and some work which he was to do for the vendor on the adjoining lot. About half the land was cleared. The plaintiff paid the \$150 by October, 1851. Immediately after the purchase the plaintiff went into possession, and has been in possession and has cultivated the land ever since. By the fall of 1855 he had cleared the greater part of what had been in wood

(a) Woodruff v. Mills, 20 U. C. Q. B. 58.

when he bought; and in 1857 he built a house on the property, in which he and his family have ever since lived. He is described in the evidence as an illiterate man; as being able to read print, but not to read writing; and he is stated not to take a newspaper. The vendor was his brother. The vendor does not appear to have himself got a conveyance of the lot until 25th June, 1855. On the 13th April, 1857, he mortgaged the lot of which the fifty acres in question formed part, to John Haight Cornell and Samuel Palmer Cornell; and they, on the 25th May, 1863, assigned this mortgage to the defendants the Bank of British North America.

The defendants were before this assignees of certain judgments recovered against Thomas Moore; and on the 19th of June, 1860, they filed a bill against him and the mortgagees mentioned, and certain other judgment creditors of Moore, praying for liberty to redeem the prior incumbrances, and for a sale of the land in question, and of other lands of the debtor. Under this bill the Bank became the purchasers; and on the 14th July, 1863, Thomas Moore executed to them a conveyance in pursuance of the sale. Some time afterwards the Bank commenced an action of ejectment against the plaintiff; and on the 14th September, 1865, the plaintiff filed the present bill to restrain the action, and for the specific performance of his contract. The cause came on to be heard before the Chancellor, at Brantford, on the 6th November, 1865, when a decree was made dismissing the plaintiff's bill.

The following is the note made by his lordship of his judgment:—
“Whatever opinion I may have individually entertained on this question, I learned from both my brother Judges (a), shortly after entering upon my duties as Chancellor, that it was considered as settled law in this Court, that constructive notice—such as that by possession, &c.—did not avail against a registered title. My brother Spragge still considers that to be the view on which the Court has acted in such a case. This being so, I think I should dismiss the bill with costs, leaving it to the plaintiff to seek for a different declaration of the law either on re-hearing or appeal.”

It appears that the impression his lordship thus had at the moment, of what had theretofore been held, was not quite correct. It had theretofore been supposed that constructive notice of an unregistered deed which was capable of registration did not avail against a registered deed; but no such doctrine had been laid down where the unregistered claim was not founded on an instrument capable of registration. On the contrary, in that class of cases, it had been distinctly held in this country as well as in England, that the Registry Act did not apply, and that constructive notice was as effectual as in other cases; and this appears to have been his lordship's own view of what was the correct principle.

There was no express proof that at or before the time of the execution of the mortgage or the deed, the mortgagees or the Bank had actual

(a) *Esten and Spragge v. CC.*

notice of the sale to the plaintiff; but as the plaintiff was in possession of the property, the mortgagees and the Bank, *prima facie*, took subject to the plaintiff's right. On this point it is only necessary to refer to *Holmes v. Penny* (a) in Appeal, in which the rule was laid down by the Lord Justice Knight Bruce in these words: "I apprehend that by the law of England, when a man is of right and *de facto* in the possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property conflicting or inconsistent with the title or alleged title under which he is in possession, or which he has a right to connect with his possession of the property. It is equally a part of the law of the country, as I understand it, that a man who knows, or cannot be heard to deny that he knows, another to be in the possession of certain property, cannot for any civil purpose, as against him at least, be heard to deny having thereby notice of the title, or alleged title, under which, or in respect of which, the former is and claims to be in that possession." The same thing was held by my brother Spragge in *Gray v. Cowcher*. The consequence of this rule is, that persons dealing for land should ascertain whether the vendor or mortgagor is in possession, and if not, whether the person in possession has or claims any title; and this imposes no unreasonable burden. A purchaser or mortgagee may fairly be expected and required to make some examination of the property he bargains for; and possession being a fact patent to everybody, the danger of its being falsely asserted is greatly less than of actual and express notice of an unregistered claim being falsely alleged.

The Registry Act in force at the time of the plaintiff's purchase was 9th Victoria, chapter 34 (1846), the 6th section of which corresponds with the 44th section of the Act in the Upper Canada Consolidated Statutes (b) and is that on which the contention of the defendants proceeds. By these enactments, as against a subsequent purchaser or mortgagee who has registered a memorial of his deed or conveyance, every prior unregistered "deed or conveyance" was made void: and the settled construction of this enactment in England and in this country is, that it does not affect any equitable right or interest which cannot be registered, but renders void such deeds and conveyances only as are capable of registration. This as Vice-Chancellor Sir W. Page Wood observed in *Neve v. Pennell* (c), "might indeed, introduce the mischief intended to be remedied in another form; but it was one which the machinery furnished by the Act cannot meet; which is not the case where there exists a document capable of being placed on the register." In this country the mischief is prevented in future cases (d) by the Registry Act of 1865 (e), which provides broadly that no (unregistered) equitable interest shall be

(a) 8 D. M. & G. 580.

(b) Ch. 89 p. 891.

(c) 2 H. & M. 187.

(d) *Macdonald v. Macdonald*, 14 Gr. 133.

(e) 29 Vic. ch. 24, sec. 66.

valid "against a registered instrument executed by the same party, his heirs, or assigns."

I have said that the settled construction of the enactment, as it previously stood, was that it did not affect equitable rights which were incapable of registration. Thus, in *Sumpter v. Cooper* (a) Lord Tenterden, speaking for himself and the rest of the Court of Queen's Bench, used this language: "As to the Statute of Anne (b) we think it cannot be held to apply to the case of an equitable mortgage. It refers only to the registration of deeds; and where there is merely a lien or equitable mortgage created by the deposit of deeds, there is no instrument to be registered;" and when the point is referred to in the English Equity Reports, the only question is, whether the unregistered claim is under an instrument capable of registration (c).

In Ireland, the point does not appear to have been quite so well settled. In *Buckley v. Lanauze* (d), which was a case of a will, it was distinctly recognized, Lord Plunkett observing: "The Registry Act has no application, inasmuch as under the Irish Registry Act the registry of a will is not provided for, and it is not therefore, a case between a registered and an unregistered title;" and "the ordinary rule of constructive notice is to be applied." In *re Driscoll's estate* (e), the learned Judge in giving judgment, said: "A considerable portion of the argument before me was on the question, whether an equitable mortgage, by deposit of title deeds on a parol contract, is postponed to a subsequent registered actual mortgage. The first is manifestly incapable of registration; and if such a transaction creates an equitable security, it would seem somewhat hard to hold that, while it is incapable of receiving aid or protection from the Registration Acts, it is liable to be defeated by their operation. To establish the priority of a security created by such deposit over a subsequent mortgage, could scarcely be considered a hardship on a pious mortgagee who must take his security without obtaining the usual indicia of title. It is not necessary that I should now decide this point, for it does not arise on my previous ruling; but for a time it seemed to me to arise, and during the argument I intimated an opinion rather favorable to the view that the registry of the subsequent mortgage should not give it priority." In that case the case in the Court of Queen's Bench (f) and that in the 13th Irish Common Law (g) were cited to the learned Judge; and also a case of *Rice v. O'Connor* (h), where it had been said that possession under a parol contract partly performed, was not notice as against a registered title. That view is directly opposed to *Holmes v. Penny* (i); but

(a) 2 B. & Ad. 226.

(b) 7 Anne, ch. 20, sec. 1.

(c) *Scrutton v. Quincey*, 2 Ves. Sr. 413; *Wright v. Stanfield*, 27 Beav. 8; *Moore v. Culverhouse*, 1b. 639; *Neve v. Pennell*, 2 H. & M. 170; *Holmes v. Penny*, 8 D. M. & G. 572.

(d) L. & G. t. Plunkett, 341; see also *O'Connor v. Stephens*, 13 Ir. C. L. 68.

(e) *Irish Repts.* 1 Eq. 288.

(f) *Sumpter v. Cooper*, 2 B. & Ad. 223.

(g) *O'Connor v. Stephens*, 13 Ir. C. L. 63.

(h) 11 Ir. Ch. 510; 8 C. 12 Ib. 424.

(i) 8 D. M. & G. 572.

neither *Holmes v. Penny* nor any of the other cases I have referred to was cited to the Court; and the point, in the view taken in appeal of the other facts of the case (a), was not material.

In this Court the authorities are very clear. The very point was decided in *McMaster v. Phipps* (b). There Chancellor Blake, speaking of the Registry Act then in force, observed: "It settles the priority between conflicting deeds or instruments (if that be the correct construction) which admit of registration, but it does not affect to deal with equitable rights which do not arise upon any deed or written instrument, and as to which therefore, the provisions of the Registry laws are wholly inapplicable. The language and scope of the Act shew that equities of this sort were not in the contemplation of the Legislature; and indeed, as to them, legislative interference was wholly unnecessary, for a purchaser for value without notice was always protected, and I have already shewn that a purchase with notice is not within the Act at all." V. C. Esten said: "I think that equities of this nature are not extinguished by implication—they are certainly not expressly avoided—as against a registered title, by the Registry Act, and that the case of equitable mortgages is only mentioned *exempli gratia*" (c). This has been assumed to be the law ever since (d). In the *Bank of Montreal v. Baker* (e), the present Chancellor observed of the document there in question: "If by reason of its being treated merely as a parol instrument it could not be registered, then we are of opinion that the registered judgment could not prevail against it, as in such case the Registry Act as to it could have no application;" and his lordship referred to *McMaster v. Phipps*, and *Sumpter v. Cooper* as authorities for this statement of the law.

It was contended for the plaintiff that the question I have been considering was not open to the defendants, as they had not shewn that the title prior to the plaintiff's contract was a registered title. This objection was not taken at the hearing before the Chancellor, and on the contrary, it appears from the Chancellor's notes, to which we have referred, that the facts were admitted by the plaintiff, and that the effect of them alone was argued. I have therefore assumed that the defendants had a right to raise the point on the re-hearing.

If the plaintiff had claimed under an instrument capable of registration, the case would have been open to some difficulty, as the Court here, before the decision of the Lords Justices in *Holmes v. Penny* (f), had held that possession was not sufficient notice of such an instrument as against a registered deed (g); and there are decisions of the Irish Courts to the

(a) 12 Ir. Ch. 424.

(b) 5 Gr. 258.

(c) *Ib.* 261.

(d) See *Burgess v. Howell*, 8 Gr. 37; *McQueen v. Campbell*, 8 Gr. 245; *Cherry v. Morton*, *Ib.* 407; *McCrum v. Crawford*, 9 Gr. 340; *Robson v. Carpenter*, 11 Gr. 293; *Harrison v. Armour*, *Ib.* 303.

(e) 9 Gr. 299.

(f) 8 D. M. & G. 572.

(g) *Waters v. Shade*, 2 Gr. 404; *Ferriss v. McDonald*, 6 Gr. 310; *McCrum v. Crawford* 9 Gr. 340.

same effect (a). There are also general observations in the reports of this Court, to the effect that constructive notice of an instrument capable of registration is not sufficient against a registered deed (b)—which has not, in so many words, been held or said in any English case I have seen, though the doctrine, subject to the exceptions I shall mention, seemed implied in or fairly inferrible from the strong language used in some early cases, as to the kind of notice necessary to sustain a claim against a registered deed. Thus, in *Hine v. Dodd* (c) it was said, that the “proof must be extremely clear;” that “apparent fraud, or clear and undoubted notice, would be a proper ground for relief, but suspicion of notice—though a strong suspicion—is not sufficient,” &c. In *Jolland v. Stainbridge* (d) Lord Alvanley said: “It must be satisfactorily proved that the person who registers the subsequent deed must have known exactly the situation of the persons having the prior deed, and knowing that; registered in order to defraud them of that title he knew at the time was in them.” In the later case of *Wyatt v. Barwell* (e), Sir William Grant stated the doctrine of the Court to have been this: “We cannot permit fraud to prevail; and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be effected. • • It is only by actual notice, clearly proved, that a registered conveyance can be postponed. Even a *lis pendens* is not deemed notice for that purpose (f).”

On the other hand, in *Sheldon v. Cox* (g), which was a case under the Registry law, Lord Nottingham said: “There is no difference between personal and constructive notice, in its consequences, except as to guilt: if there was, it would be very inconvenient and notice would be avoided in every case by employing an agent. The Statute of Queen Anne was intended only to protect purchasers against secret conveyances, but does not prevent their being affected with notice in the same manner as if that Statute had not been made.” The reporter has added a query, whether the case was well considered. Again, in *Ford v. White* (h), the strong language of the earlier cases was thus explained or modified: “I have been referred,” said the Master of the Rolls, “to several cases to shew that there should be clear evidence of notice. That is so; but all that is meant is, that the notice proved in this, as in all other cases, must be sufficient to satisfy the Court, and then it must be acted on. If the evidence be doubtful, the Court will either order an enquiry or direct an

(a) In *re Burmester*, 9 Ir. Ch. 410; *Clark v. Armstrong*, 10 Ir. Ch. 263; *Rice v. O'Connor*, 11 Ir. Ch. 510; 12 Ir. Ch. 437.

(b) *Ferrass v. McDonald*, 5 Gr. 312; *Baldwin v. Duignan*, 6 Gr. at p. 508; *Graham v. Chalmers*, 9 Gr. 241; *McCrum v. Crawford*, 9 Gr. 340.

(c) 2 Atk. 275.

(d) 8 Ves. 485.

(e) 19 Ves. 439.

(f) See also *Wallace v. The Marquis of Donegal*, 1 Dr. & Wal. 488; *Bushel v. Bushel*, 1 Sch. & L., 100.

(g) 2 Amb. 626.

(h) 16 Beav. 123.

issue to try the fact" (a). It was held in the same case that a person claiming under the Registry law is affected by constructive notice of all that is on the Registry, and of all that what he finds there would put him upon inquiry respecting. The plaintiff was a mortgagee, and the question was as to his right to priority over a mortgage subsequently executed to one Parkes, but registered before the plaintiff's mortgage. This second mortgage was afterwards assigned to one Paget and others. The Master of the Rolls was satisfied that Parkes, at and before he got his mortgage, had actual notice of the plaintiff's mortgage; but there was no evidence that Paget and the others (who claimed under Parkes) were aware of this when they took their assignments. The Master of the Rolls held as follows: "If they relied on the register, I apprehend they must be taken to have notice of the whole register; and if so, they had notice that, two months after the date of Parkes's mortgage, a security was registered, purporting to be dated four years previous. This would put them upon enquiry whether Parkes had notice (b)." I may add that Lord Romilly is one of those Equity Judges who have expressed their regret as to the effect of the decisions which have qualified the Registry Act (c). It was held in *Le Neve v. Le Neve* (d) followed by other cases (e), that actual notice to a man's solicitor or agent is sufficient as against a registered deed, though there may have been no actual knowledge by the man himself.

These cases are law here as well as in England; but, in the late case of *Wormold v. Maitland* (f), after a full discussion of the English authorities, it was held by the Vice-Chancellor Sir J. Stuart, broadly, that constructive notice has the same effect as against a registered title as in other cases. In the course of his judgment his Honour observed: "I listened attentively to the defendant's counsel, who argued the case very elaborately, to hear if anything would fall from them to shew (there being no authority for the proposition) that there was anything in the way of principle, or anything which could be suggested, why there should be any difference in their effect between actual notice and constructive notice, and I heard nothing of the kind. No doubt there are cases, from *Hine v. Dodd* downwards, where the expression 'clear and undoubted notice' has been used; and that expression, it has been argued, means actual—as contrasted with constructive—notice. But I should do a very dangerous thing if I countenanced that notion, because constructive notice is notice; and if notice, it is clear and distinct notice, according to the doctrine of this Court." The Irish cases were not cited to the learned Vice-Chancellor, but his decision appears to have been acquiesced in by the parties, and has since been expressly recognized and followed in *Re Allen's estate* (g). The second of the two classes into which Sir

(a) *Butsee Foster v. Buell*, ante p. 245.

(c) 16 Beav. 123.

(e) *Leuchan v. McCabe*, 2 Ir. Eq. 351; *Tunstall v. Trapper*, 3 Sim. 301; *Line v. Jackson*, 20 Beav. 630.

(f) 35 L. J. Ch. 69.

(b) See *Eyre v. Dolphin*, 2 B. & B. 302.

(d) 3 Atk. 466; S. C. Amb. 646.

(g) Irish Rep. 1 Eq. 455.

James Wigram divided cases of constructive notice seems to fall within the same principle as cases of actual notice, viz., positive fraud. The class of cases referred to consists of those "in which the Court [is] satisfied, from the evidence before it, that the party charged had designedly abstained from enquiry, for the very purpose of avoiding notice" (a). And there is sometimes great difficulty in drawing the distinction between cases of fraud and mere cases of implied notice (b). In the second report of the Real Property Commissioners (c) it is observed: "Between actual notice and the highest degree of constructive notice there is no substantial difference; indeed the latter, as resting oftener on written evidence, is frequently more clear and satisfactory; and the deference to moral feeling, which affords perhaps the strongest reason for giving effect to actual notice, would be violated in no less degree by denying the same effect to a strong and clear case of constructive notice."

The characteristics of the second class of cases described by Sir James Wigram were probably not in the contemplation of the learned Judges of this Court when saying that constructive notice would not prevail against a registered deed; but to most cases of constructive notice, not falling within that class, or within the principle of *Le Neve v. Le Neve* or *Ford v. White*, the doctrine so often stated from this place as to the insufficiency of such notice against a registered title must, in regard to rights in existence before the passing of the Registry Act of 1865, be held to continue to be the law of this Court, until either a contrary rule is asserted by the Court of Error and Appeal, or at all events, until the broad doctrine laid down by Sir James Stuart receives the express sanction of a higher Court in England. The doctrine however, as I have already pointed out, has no application to the case of an unregistered title which is not founded on a deed or conveyance within the meaning of the Act.

The defendants also set up the plaintiff's delay as a bar to relief. But delay while the vendee is in possession is no defence to a bill for specific performance (d); and here the purchase money was duly paid, and all that remains unsatisfied of the consideration—if anything remains unsatisfied—is some work which the plaintiff was to do in clearing the adjoining lot, for which no time was fixed, and with respect to which, it does not appear that the vendor ever made a demand that the plaintiff did not comply with. These circumstances constitute an additional answer to the defence of delay.

The learned counsel for the defendants contended further, that the plaintiff had acquiesced in his vendor's subsequent dealings with the property. No such defence is set up in the answer, or therefore, is open to the defendants now. But there is no evidence whatever of acquiescence.

(a) *Jones v. Smith*, 1 Hare 55. See Sug. V. & P. 14 ed. pp. 783, 784.

(b) *Benham v. Keane*, 1 J. & H. 702.

(c) 1830, p. 38.

(d) *Sharp v. Milligan*, 22 Beav. 606; *Clark v. Moore*, 1 J. & La. T. 723; *Burk v. Smyth*, 3 Ib. 193; *Crofton v. Ormsby*, 2 Sch. & Lef. 604; *Ridgway v. Horten*, 6 H. L. 292.

The plaintiff knew nothing of the mortgage until some time after it was given, when he was told of it by a friend; and he knew nothing of the Chancery sale until after it had taken place. He had heard of the suit, but was also assured by Thomas that he would make it all right; and the plaintiff thought his brother would protect him and save the property. It is manifest that these facts do not afford the slightest ground for the argument of there having been an acquiescence within the authorities on that subject.

I think there must be a decree for the specific performance of the contract. Reference to the Master to inquire whether the consideration has been fully paid; and if not, what is due to the plaintiff in respect thereof, and the Master is to charge the plaintiff with the value in money, of any work which the plaintiff has not performed, and is still liable to perform. Just allowances to all parties. Defendants the Bank to pay the costs of the plaintiff, less the amount (if anything) which the plaintiff is still liable for. Should the balance be in plaintiff's favour, or on payment of the balance if against him, conveyance to be executed.

Letter from H. Bellenden Ker, Esq., addressed to the Lord Chancellor.

"MY LORD,

In compliance with your Lordship's direction, I have, in conjunction with Mr. Hayes and Mr. Christie, revised the act passed in the last session 'for simplifying the Transfer of Property (a).' Though most of the various objects which that act embraces are of a practical and beneficial character, and ought to be included in any comprehensive scheme for ameliorating the law of property, yet the apparent inexpediency of some of its provisions, except, perhaps, as parts of such a scheme, and the confessedly imperfect frame of others, induce us to recommend, as the clearest and safest course, that the act should be wholly repealed, and the clauses of which the policy is unexceptionable be re-enacted in a different form.

We are quite sensible of the difficulty and danger attending any attempt at legislation on detached points of a complicated system, especially where the proposed changes tend to contradict principles on which that system is based; and we have, therefore, approached the subject not without considerable diffidence. The conviction that such partial remedies cannot be too cautiously applied, has induced us to review the act with the intention, first, of confining it to points which may safely admit of being thus separately treated, and, secondly, of legislating upon

(a) 7 & 8 Vic. ch. 76.

those points with greater accuracy and perspicuity. But, although we have prepared the bill now submitted to your Lordship, after the merits and defects of the existing act had been amply discussed by the Profession, it is yet very possible that we may have failed, either to select for omission the objectionable portions only, or to enhance, by alterations in arrangement and expression, the practical value of the rest. The result, indeed, of some recent statutes has shewn that the most elaborate enactments differ from the least accurate only in the degree of help which they require from judicial exposition.

There are two sections of the Transfer Act which it is proposed altogether to omit:—

1st. The ninth section, enabling the executor or administrator of a mortgagee to convey the legal estate outstanding in his real representative.

2ndly. The tenth section, enabling trustees and others to give discharges for moneys.

1st. As regards the ninth section, which provides for the conveyance of a mortgaged estate by the executor or administrator of the mortgagee, the design is good; but it is so imperfectly carried out by the very limited terms of the enactment, that practically the power is attended with very little real advantage. It is necessary, for the purposes of title, to ascertain that possession has not been taken, that no action or suit is pending, and that the legal estate is vested in the real representative of the mortgagee; for a mere negative allegation of these facts in the deed of conveyance would not satisfy a purchaser. But it is obvious that the necessity of proving these facts, and particularly the fact of the legal estate being vested in the real representative, (the very difficulty often being that the heir is unknown), destroys, in a great measure, the utility of the enactment. The clause, besides, authorizes a conveyance only on actual payment to the executor or administrator of the whole debt;—not extending to a conveyance on part payment or a conveyance under any arrangement for exonerating the whole or part of the lands without payment, nor to cases where the money has been paid in the mortgagee's lifetime, or the executor has received the money at a former period, or has assented to a bequest of, or has assigned the debt. And, moreover, as the power—a bare statutory authority—is not conferred on the proving executor alone, it might be considered (though not, we think, on a just view of the provision) necessary to its due execution, that an executor who had not proved, or had even renounced the probate, should join—a possible construction, which would not only narrow still further the range of the power, but probably implicate many titles depending on the contrary assumption. Another more material objection arises from the want of a precise definition of what shall, for the purposes of the act, be considered as falling within the term 'mortgage,'—a term which, taken

according to its strict legal acceptation, would exclude a large proportion of the transactions comprehended under the popular meaning of that term, and clearly within the mischief sought to be remedied by the clause in question. Such a definition should, therefore, be given as would extend the benefit of the enactment to all cases where, according to the rules of a court of equity, a party is entitled to call for a conveyance of any property, pledged or charged as a security for money, on satisfaction of the debt; whether the security be in the form of a mortgage, to which the right of foreclosure is incident, or of a conveyance to the creditor or his trustee upon trust to sell, or in any other form whatever. Some method, too, more satisfactory than the use of such terms as 'his executor or administrator,' should be devised for ascertaining the person by whom, in every possible state of circumstances, the act is to be performed; for it is only by the expression of a rule of law in general and comprehensive terms, that there can be any reasonable hope of attaining completeness or certainty. Then, as regards the principle involved in this section of the act, if it be fit that a mortgagee's executor or administrator (who, after being paid in full, has no further interest in the matter, and who, as he might, be it observed, have recovered the debt although unable to make or procure a re-conveyance of the estate, may refuse to exercise the statutory power, vested in him as a mere instrument for the convenience of others) should be enabled by his act to denude the heir or devisee of the legal estate and vest it in the mortgagor or his nominee, it must *a fortiori* be fit that the unpaid executor or administrator should be enabled to command the legal estate *for the purposes of the security* and the better administration of that portion of the assets of his testator or intestate. It can hardly be contended that the equity of the executor or administrator to have the full benefit of the unsatisfied and forfeited mortgage is not as strong and as urgent, at least, as the equity of the mortgagor to have the full benefit of the redemption. In each case the same principle applies; and that principle, fairly carried out, would require that every person entitled to call for the legal estate should be enabled to obtain it with as little difficulty and expense as may be consistent with safety to the rights of parties, and with the maintenance of the distinction between the jurisdictions of law and equity. In the actual state of the law, there are three modes by which a party equitably entitled may get in the legal estate:—1st. By obtaining—often at a great expense—often on imperfect evidence, which leaves the title open to question—a conveyance from the party in whom the estate is actually vested, if competent and willing to convey it. 2ndly. In certain cases of incapacity, absence, or refusal, by the still more costly remedy of an order of the Court of Chancery, made on a summary application by petition, pursuant to the acts relating to infant trustees, &c.; but which application involves a reference to the Master, with all its consequences. 3rdly. In cases not within those acts, (which are crippled by many unne-

cessary exceptions), at a still greater expense, by means of a suit in equity regularly instituted. Now all the cases to which the above acts extend fall within the principle of the power in question enabling the executor or administrator of a mortgagee to convey; and that principle once admitted should be adopted to its fullest extent, unless it can be shewn that its general adoption would be productive of inconvenience. But if the general power were so framed as to make its exercise dependant on the fact of the right in equity to call for the legal estate being really in the party who makes the disposition, no undue advantage would be obtained, while the title would be relieved from the necessity which at present exists of proving that the legal estate is vested in the party by whom (or by whose substitute) it is assumed to be conveyed. Having arrived at the conclusion that a free, yet well considered application of the principle already admitted by the Legislature is of the very essence of a wise and just amendment of the law of real property, no attempt has been made to fit the existing clause to the particular case at which it is aimed. If, however, it should be deemed expedient to make a partial application of the principle—to amend the law by engrafting upon it an anomalous provision—the ninth section of the Transfer Act may be so modified as to attain more perfectly the very limited objects of its framers. Though these observations are applied to outstanding legal fees, yet the mischief extends to outstanding terms of years, which, notwithstanding all the remonstrances of the Profession and the practical examples afforded by every railway act of the summary abatement of those nuisances, remain to this day a fertile source of expense, difficulty and delay in the deduction of titles to real estate (a).

2ndly. As regards the tenth section, which enacts that the payment to, and the receipt of, any person to whom any money shall be payable, on any express or implied trust, shall be a discharge, it is conceived that it never could have been in the contemplation of the framers of the act to render in equity the receipt of the person entitled at law under every trust whatsoever (whether merely implied or otherwise) an effectual discharge to the party paying. The effect of this new rule, if carried to its fullest extent, would be to alter essentially one of the most important principles of a court of equity. It is conceived that the rule was intended to remedy an inconvenience of a much narrower extent. In equity the person beneficially entitled is the person to concur in directing the payment to the trustee, except where the *cestui que trust* is unascertained or incompetent, or where there is some trust shewing that the trustee was to have the money at his disposal for a particular purpose, (as that of re-investment, &c.), or where there is an express declaration absolving the person paying from seeing to the disposition of the money. The

(a) A remedy has, however, been since attempted by the late act 8 & 9 Vic. c. 112.

rules as to the liability of a party paying money to a trustee, without the concurrence of the *cestui que trust*, to see the money duly applied, have varied, and are not yet precisely defined. To avoid any question, it has been usual to accompany a trust for sale, &c., with a declaration that the receipt of the trustee shall be a sufficient discharge. This occasionally is omitted, and thence a difficulty may arise, either in ascertaining whether the party paying is or is not bound to see to the ultimate disposition of the money, or in procuring the concurrence of the party entitled, who may be abroad, &c. The evil goes to this extent only; but the remedy is far more extensive, and is one which a very slight consideration will shew the danger of adopting. There can be no question but that it would be desirable to supply a fit remedy, by carefully ascertaining the state of the law as regards any discrepancies or uncertainties, and removing them; and so to extend the rule as to obviate all practical inconvenience. Perhaps a rule which, with some modifications, should give every trustee having an express power to sell or raise money an authority to give a receipt for it, would be advisable. And such a rule would be consistent with the 30th Order in Chancery, which renders it unnecessary to make the *cestui que trusts* parties to a suit where there are trustees competent to sell and give receipts; but if the clause as it stands in the act were to remain, it would of necessity lead to an alteration of the practice; and in all cases where there was a trustee of money, under any trust direct or implied, it would become unnecessary to make the persons interested parties. The remainder of the section refers to the receipts of the survivors of mortgagees being effectual discharges. Similar objections apply to this branch of the clause. Trustees often lend money on mortgage, and take the security to themselves as joint tenants, not noticing the trusts in the deed; but generally there is inserted a declaration that the receipt of the survivor shall be a discharge—thus negating the equitable tenancy in common. When this declaration is omitted, and a trustee dies, it becomes necessary to shew the trust of the money, and the power of the surviving trustees to give a receipt for it; and this evidence becomes part of the mortgagor's title. It was to remove this inconvenience that the clause was framed; but it goes far beyond the evil in question, by making the receipts of the survivor of *all* mortgagees who are at law joint tenants sufficient. Now in practice, many persons, not trustees, &c., take securities in joint tenancy; and it would seem very inexpedient thus to repeal generally the salutary equitable rule as regards these securities, and to allow the survivor to possess himself of the whole funds, without the concurrence of the representatives of the other equitable tenant in common. Supposing, however, that this part of the clause is retained, the expression of the rule in the statute being inaccurate, it would require considerable alteration.

As these two sections involve great and extended alterations of the law, without supplying any complete or careful expression of the rules, it

has been thought necessary to explain at length the reasons for omitting them from the proposed bill (a).

In the preparation of this bill very little more has been attempted than a re-enactment, in terms more precise and apt, of the clauses of the existing act. If it had not been considered expedient to confine the present bill to a re-enactment of the clauses of that act, except as above stated, and if there had been sufficient time, it is conceived that much advantage might have been derived from enactments which would remove many of the inconveniences arising from the present state of the law relating to the transfer of property. There are many points in addition to those relating to outstanding legal estates already adverted to, as to which enactments might be framed calculated to effect a great diminution of expense in tracing titles. The whole law relating to judgments is very confused and obscure; and the law relating to covenants might be altered with advantage. A reference to the reports of the Real Property Commissioners will fully prove that much yet remains to be done towards simplifying the transfer of, and removing various difficulties relating to the evidence of the title to real property.

It is now proposed to add some observations on the remaining provisions of the Transfer Act, and some explanation of the views with which the provisions intended to be substituted by the proposed bill have been framed.

As to sect. 2 of the Transfer Act, and also of the proposed bill. An oversight, to which we think undue importance has been attached, has rendered this clause a nullity for practical purposes. A doubt existed whether a lease or bargain and sale for a year, on which a release is founded, is chargeable with progressive stamp duty. The better opinion probably is that the duty is not chargeable, but it had become the general practice to pay the progressive stamp duty. By the Act of the fourth of Victoria, cap. 21, dispensing with a lease for a year, it was provided that the release should be chargeable with the lease-for-a-year stamp duty, (other than the progressive duty), thus giving a kind of legislative sanction to the practice which had obtained. By the second section of the act of last session, a deed, which, without more, was thereby made to operate as a conveyance of the immediate freehold in land, was charged 'with the same stamp duty as would have been chargeable if such conveyance had been made by lease and release.' It was suggested, but we think erroneously, that this enactment required that the progressive duty which would have been chargeable on a lease for a year was chargeable upon the deed deriving its validity from the act; and this having been generally adopted, while there was no measure of the amount of such duty, (which depended on the length of an instrument which did not exist),

(a) The "bill" here referred to is now the Act 8 & 9 Vict. c. 106.

it has become the general practice to entirely abandon this clause of the act, and accordingly conveyances to which it would have been applicable are now made under the Lease and Release Act of the fourth of Victoria. This section has been the subject of much criticism and discussion; and it must be admitted that it is not conceived or expressed with that attention to principle and that exactness which ought to characterize an enactment on the subject to which it relates. When it is said that 'any person may convey by any deed, without livery of seisin or inrolment, or a prior lease,' it seems to be assumed that there is in law some standard instrument by which, with the addition of any of the above concomitants, the immediate freehold in lands may be conveyed; but there is in fact, no such instrument in law. There are (besides a covenant to stand seised) three several assurances adapted to convey it, viz., feoffment, bargain and sale inrolled, and lease and release, all founded on different principles, differing in their *modus operandi*, and having an important difference in their effects. If the deed of conveyance established by the Transfer Act be a new statutory assurance, which is neither a feoffment, nor a bargain and sale, nor a lease and release, it is merely nugatory to provide that such assurance shall be effectual 'without livery of seisin, inrolment, or prior lease,' for the forms or solemnities in question have not the slightest significance with reference to such a conveyance; while if, on the other hand, it be considered that the framers did not intend to introduce any new assurance, but only to exempt the existing assurances from useless and troublesome forms, the inattention to principle in the structure of the section is equally apparent; for it is not clear that it would not be necessary to attribute to the assurance the character either of a feoffment without livery, or a bargain and sale without inrolment, or a release without a lease for a year, and there seem to be no means of ascertaining to which of the three kinds of assurance the conveyance under the act would belong. The only point on which the act can be pronounced clear is, that the assurance, if a bargain and sale, shall operate by transmutation of possession, that is, have the like effect in transferring the legal seisin as a common law assurance would have had, contravening in this respect an established construction of the Statute of Uses, without any other necessity than that which is imposed by the form of the enactment. A further objection is, that it seems to be assumed that livery of seisin has the same reference to a charter of feoffment which enrolment has to a bargain and sale, the fact being that livery of seisin is the essence of a feoffment of which the charter is only the evidence, while the bargain and sale is *the* assurance to the efficacy of which the form of inrolment was made necessary by a subsequent statute. The general object of sect. 2 of the proposed bill is the same with that of the corresponding section of the Transfer Act; namely, to give to all freehold lands in possession the capacity of being transferred without any of those forms or solemnities which occasion expense and trouble, but

have no essential connexion with the act of transfer. A large class of freehold hereditaments is, by the existing law, and has, from the remotest antiquity, been invested with this capacity, to the extent of being transferable by the observance only of those forms or solemnities which are included in the execution of an ordinary deed: The hereditaments so circumstanced are technically said to lie in grant, while the hereditaments to which the law has hitherto denied the capacity of being transferred by deed are technically said to lie in livery. It has never been proposed that the class of property with which this section deals should be made transferable by any mode less formal than a deed. We have therefore considered that the most direct and the most simple means of obtaining the object proposed is, to impart to *corporeal* hereditaments, that is, to hereditaments which lie in livery only, the capacity of being transferred by deed, by providing that, 'as regards the conveyance of the immediate freehold thereof,' they 'shall be deemed to lie in grant as well as in livery.' The effect of the clause will be to render a reference to the Lease and Release Act of the 4 & 5 Vic. c. 21, unnecessary in the case of corporeal hereditaments in England, and to dispense with a reference to or recital of a lease for a year in the case of corporeal hereditaments in Ireland.

As to sects. 3 and 4 of the Transfer Act, and sect. 3 of the proposed bill. The third section of the bill consolidates the third and fourth sections of the act, and extends the requirement of a deed to the case of a feoffment. It is apprehended that when the solemnity of a deed was required for the transactions to which these sections apply, the case of a feoffment was not advisedly omitted. An exception is necessarily introduced as to a customary feoffment by an infant. As the cases of such feoffment are local and rare, and the power of making them at all of doubtful expediency, and at variance with the policy of the general law, it did not seem advisable to remove the personal incapacity of the infant so as to enable him to make a deed. The power for an infant of a certain age to make a feoffment exists only under the custom of gavelkind; and should any change be made in the law on this subject, it would perhaps be better to take away the power of making such feoffments, than to attempt improvements in the mode of making them.

As to sects. 6 and 7 of the Transfer Act, and sec. 4 of the proposed bill. The fourth section of the bill consolidates the sixth and seventh sections of the act. The omission from the act of the word 'give' (which has the like effect in implying a warranty or covenant in law, or indeed a surer effect for that purpose than the word 'grant') was probably an oversight. The like observation applies to the omission of 'partition,' which is, to a considerable extent, in the same predicament, with respect to the implication of a warranty or condition in law, as an exchange. The doctrine is not so prominently called into notice in the case of partition as in the case of exchange, because in the great majority of instances,

the undivided share which a co-tenant gives up in one portion of the land is held under the same title with the undivided share which he retains in the portion which he takes in severalty; and thus, in dealing with property taken in severalty on a partition, the investigation of the title to the undivided share given up occasions no additional expense or trouble, being in fact involved in the investigation of the title to the undivided share retained. But though the practical inconvenience of the implied condition is less in the case of partition than in the case of exchange, yet, as the inconvenience is the same in kind, and the principle identical, it would be absurd in a legislative measure to provide for the one case and to omit the other. It is perhaps unnecessary to observe that the seventh section of the act, which declares 'that no assurance shall create any estate by wrong, or have any other effect than the same would have if it were to take effect as a release, surrender, grant, lease, bargain and sale, or covenant to stand seised,' has been understood by some persons to deny effect to an assurance made by way of appointment, and consequently that this construction has occasioned some alarm to parties having powers of appointment equivalent, in point of dominion, to the fee, but having no power of alienation otherwise than by an exercise of their power.

As to sect. 11 of the Transfer Act, and sect. 5 of the proposed bill. The first branch of the eleventh section of the act, declaring 'that it shall not be necessary in any case to have a deed indented,' appears open to the objection of ambiguity; as, first, it may mean that the act or ceremony of indenting need not be performed on the material on which the intended instrument is written, &c., and this meaning is in accordance with the marginal note, but then such note is not part of the act, and cannot be used to construe it; or, secondly, it may be merely descriptive and mean that it shall not be necessary in any case to have an indenture. The terms descriptive of an indenture in the Statute of Inrolments (27 Henry 8, c. 16) are, 'a writing indented, sealed, and inrolled in,' &c. It must be borne in mind that the mode of conveyance by bargain and sale inrolled has not been expressly abolished. Now, suppose the true construction of this enactment to be the construction first suggested, and so to render the act of indenting unnecessary, then the bargain and sale will necessarily be a writing sealed and enrolled according to the Statute of Inrolments, also signed in those cases in which signature has been rendered necessary, but not subjected to the act or ceremony of indenting; on the other hand, suppose the other construction of this enactment to be the correct one, viz., that it shall not be necessary in any case to have an indenture, then this enactment is virtually an abolition of the mode of conveyance by bargain and sale, for the enactment is *negative*, and the form of a statutable bargain and sale of a freehold interest would be unascertained and unascertainable. The second branch of the eleventh section of the act declares that any person not being a party to any deed ['not party to any deed whatsoever' is the literal expression, though

obviously not the real meaning] may take an immediate benefit under it [there really is not anything to which this pronoun *it* relates], in the same manner as he might under a *deed-poll*. The few words interposed and bracketed in the preceding statement indicate some terms and expressions which are very open to critical objection, though not unintelligible. But the real and strong objection to this second branch of the eleventh section is, that it has not been framed with sufficient regard to the qualities of precision and caution. The general rule intended to be thereby varied may be stated thus; viz: 'that a person cannot, under an indenture purporting to be between parties, be immediate grantee or be a covenantee, unless such person be expressly named among the parties.' The defect intended to be cured was the omission to name the immediate grantee or the covenantee among the parties to the indenture, and the most obvious and sure mode was to enact that the deed should operate in regard to him as if he had been named among the parties; but the enactment in question gives the indenture effect by reference to a deed-poll. Now the effect of the *indenture*, supposing that every person intended to be immediate grantee or to be covenantee had been properly named among the parties, either would be the same as the effect of a *deed-poll*, with respect to the immediate grant or the covenant in question, or else would be different. If the same, then there is a useless circuitry of language and thought; but if different in any possible case, then there is error. It is sufficient to mention the subject of estoppel as one in which the effect of an indenture differs from the effect of a deed-poll. We propose by the fifth section of the bill to effect, in a manner which we hope to be both clear and safe, only that which we suppose to have been the real meaning of the eleventh section of the act.

As to sect. 5 of the Transfer Act, and sect. 6 of the proposed bill. The sixth section of the bill differs (besides the difference in form) from the fifth section of the act in the following particulars:—Personal chattels are omitted, because contingent interests in such chattels, being almost invariably equitable, are already assignable in the only way in which, from the nature of the subjects, they are susceptible of assignment. In fact there seems to be no subject upon which an enactment giving a power to assign a legal contingent interest in personal chattels could operate. Had the case been otherwise, we should not have considered it consistent with exact or methodical legislation to mix up a detached point as to personal chattels in an act relating to the transfer of real estates. With respect to married women the existing act makes no distinct provision, and the general enactment, that any person may convey, &c., 'by deed,' could not have been intended to enable married women to convey contingent interests without an observance of the provisions respecting conveyances by married women of the Statute for the Abolition of Fines and Recoveries. We consider that a question might arise whether married women are included under this section, and if

included whether their conveyances would not be effectual without a compliance with the provisions of the above statute. We have therefore directed in express terms that dispositions by married women under the sixth section of the proposed bill should conform to those provisions. As the proposed enactment would not upon any reasonable construction extend to the expectancies of heirs apparent or next of kin, or hoped-for advantages from unexecuted instruments or the wills of living persons, we have abstained from making an express exception of these matters; the addition of the exception would necessarily render obscure the meaning of the positive enactment, while we think that no obscurity will exist unless introduced by this needless addition. We are not sure that we see the object of the provision in the fifth section of the act, that no chose in action shall be assignable at law. Such a qualification is unnecessary in the enactment which we propose to substitute, and indeed would be wholly irrelevant. As the twenty-second section of the Statute (4 & 5 Will. 4, c. 92) for the Abolition of Fines and Recoveries in Ireland has provided, in terms somewhat different, for the conveyance of contingent interests, we have deemed it advisable to confine the sixth section of the proposed bill to England. The terms of the enactment for Ireland have not been pursued, because it appears to be so framed as to enable the original taker of a contingent interest to convey it, but not to confer on his assignee a similar power. It is not, perhaps, clear that the fifth section of the Transfer Act is not open to the same objection.

As to sect. 12 of the Transfer Act, and sect. 9 of the proposed bill. This section of the act is even less perfectly expressed than any of the other sections. The case (one of not unfrequent occurrence) of the merger of the reversion in a particular estate which is itself subsequently merged is omitted. And while the benefit arising from the obligations of the lessee are annexed to the estate for the time being expectant on the lease, notwithstanding the merger of the particular reversion originally expectant thereon, there is no corresponding annexation to the same estate of the obligations of the lessor. These omissions would have rendered the repeal of this particular section necessary, even had no other alteration in the act been required. The language of the section seems to be taken, to a considerable extent, from the act of the 32 Hen. 8, c. 34; but a degree of inaccuracy pervades the whole, for which it is difficult to account. The section begins by speaking of 'a lease;' subsequently the same interest is called 'his lease, demise, or grant,' being the language of the act of Henry VIII. It is provided, that the person entitled to the estate into (in) which a reversion shall merge shall enjoy the like advantage, &c., against the 'lessee, his heirs, successors, executors, administrators and assigns, for non-payment of rent, &c., contained 'in his lease, demise, or grant, *against the lessee, farmer, or grantee, his heirs, successors, executors, administrators, and assigns,*' the latter words, 'lessee, farmer,' &c., (being again the language of the act of Hen. VIII.)

relating precisely to the same subject before expressed by the single word 'lessee,' and being moreover a repetition. But the words are not merely a repetition,—a mere surplusage in point of expression,—nor are they as innocuous as two wholly irrelevant lines inserted at random would be; for the omission of the words the 'lessee, his heirs,' &c., would have made the words in italics significant, if not correct, and the omission of the words in italics would also have left the clause comparatively right. But the insertion of both, while one must be rejected before the clause becomes even language, and the expression of each in words wholly differing though manifestly intended to relate to the same subject, and the absence of any guide to shew which is to be rejected, produce a degree of embarrassment which would alone furnish a reasonable excuse for the repeal of this section.

As to sect. 13 of the Transfer Act. It is not clear what the effect would be of the provision that the act should not extend to 'any act or thing executed or done before the 1st of January, one thousand eight hundred and forty-five,' and there is little doubt that these words would be the source of much discussion; but the provision that the act shall not extend to any 'estate, right or interest created before the 1st of January, one thousand eight hundred and forty-five,' has already received a practical exposition in the generally adopted opinion, that the act has no application to any estate tail, estate for life, or other particular estate, or to any lease existing at the commencement of the act, or, so far as the power of alienation is concerned, to any contingent or future interest created before that date. This is wholly unreasonable; and an undistinguishing withdrawal from the presumable benefits of the act of a large class of interests which have the first claim to be attended to in any legislative measure, could not have been intended; and even had no other alteration been required, yet in this particular an amendment of the act would have been absolutely necessary.

I have the honour to remain

Your Lordship's obedient servant,

"H. BELLENDEN KER."

"LINCOLN'S INN, 28th April, 1845."

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ADDENDA.

- PP. 4, 5, 6.—On the covenant against assignment without leave, that assignees in law are not bound though assigns are named, and that their assigns are bound, if assigns are named; see *Winter v. Dumerque*, 12 J. N. S. 726, Ex. Chamber.
- P. 58.—As to an instrument operating as a lease or as a mere agreement for a lease, see *Davidson Convey.* vol. 5, p. 6, and cases there cited.
- PP. 9, 72.—That a proviso for re-entry in a lease in case the lessee should be convicted of an offence against the game laws, does not run with the reversion, see *Stevens v. Copp*, L. R. 4 Ex. 20, but see per Kelly, C. B. As to covenants with a vendor of portions of lands against building thereon running with the land retained in favor of the grantees thereof, *Western v. Macdermot*, L. B. 1 Eq. 449. See further as to covenants not running with the land at Law, and yet being binding in Equity if notice had of the covenant; *Wilson v. Hart*, L. B. 1 Cha. App. 463.
- P. 191.—It is conceived that in case of death of a mortgagee, he would not, at Law at least, be so far regarded as a trustee as to prevent the application of the Statute of Victoria, and descent by primogeniture, and that in this respect Equity would follow the Law.
- P. 325.—The present practice of the Court of Chancery, under the Act for Quisting Titles, is to require that the existence of an execution in the Sheriff's hands should be negatived for a period of thirty days before the petition, from which it may be inferred that a delay to redeliver for that period would be an abandonment.
- P. 377.—That a second mortgagee, though his mortgage be *on trust* to sell, may purchase irredeemably on a sale by a prior mortgagee, see *Kirkwood v. Thompson* 13 W. R. 495, 1052, 11 Jur. N. S. 385, S. C.
- PP. 401, 402, 403.—That possession is constructive notice; *Gray v. Couch*, 15 Grant, 419. That however constructive notice by possession will not prevail against a registered instrument under the Registry Act of 31 Vic., see *Sherboneau v. Jeffs*, 15 Grant, 574.
- P. 278.—A married woman, who was residuary legatee to her separate use under Con. Stat. ch. 73, held bound by her authority to the executors, with her husband's assent, to take land in payment of a debt due the testator; and *semble* even without the husband's assent; *McCargar v. McKinnon*, 15 Grant, 361.
- PP. 223, 224.—That a wife having joined with her husband in a mortgage, is not entitled in case of deficiency of assets on his death, to have the estate exonerated as against simple contract creditors to let in dower; *White v. Bastedo*, 15 Grant, 549, overruling *Sheppard v. Sheppard*, 14 Grant, 174; see also *Thorpe v. Richards*, 15 Grant, 408.
- P. 324.—That a purchaser under execution will not be affected by mere want of non-compliance with the Statute as to advertising the sale by the Sheriff &c; *Connor v. Douglas*, in Appeal, 15 Grant, 456, and cases there referred to.

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